84-1984

No. 84-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAROLYN GROVE, WARREN RIDDLE,
and SYLVIA RIDDLE,
Petitioners,

v.

MEAD SCHOOL DISTRICT NO. 354, MARJEN AGATHER,
ROY CHRISTENSEN, RAY C. MILLER,
PHYRNE OSTLIND, AND DENNIS PATTERSON,
Respondents,

and

MEAD EDUCATION ASSOCIATION,
Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL P. FARRIS
General Legal Counsel
JORDAN W. LORENCE
Staff Attorney
CONCERNED WOMEN FOR AMERICA
EDUCATION & LEGAL DEFENSE FOUNDATION
122 C Street, N.W.
Suite 800
Washington, D.C. 20001
(202) 628-3014
Attorneys for Petitioners

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

A Christian girl was assigned the novel *The Learning Tree*, in a required course during her Sophomore year in high school. She was ridiculed by her teacher in front of the class when she refused to read the book because of its anti-Christian content which is typified by its calling Jesus Christ a "long-legged white son-of-a-bitch" and "a poor white trash God."

1. Did the Ninth Circuit Court of Appeals fail to construe the evidence in the light most favorable to the petitioners as required by decisions of this Court in deciding motions for summary judgment?

2. Does the use of a novel, which calls Jesus Christ a "long-legged white son-of-a-bitch" and a "poor white trash God" and makes numerous other disparaging remarks against Christianity, in a required course in a public high school violate the Establishment Clause by disparaging, affirmatively opposing, or showing hostility toward Christianity?

3. Are the Free Exercise Clause and the Civil Rights Act (42 U.S.C. § 1983) violated when a student is ridiculed by her teacher in front of her class for refusing to read an assigned novel and requesting an alternative book because the original assigned text violated the student's religious convictions?

4. Is the term "religion" to be defined differently for Free Exercise purposes than it is for Establishment Clause purposes as was suggested by the Ninth Circuit?

5. Does the use of a novel in a public school which directly parallels and promotes the ideology of Secular Humanism violate the Establishment Clause?

PARTIES

All parties are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit issued in this proceeding on Feb. 22, 1985, as revised on April 15, 1985.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, which appears in the Appendix at 3a, is reported at 753 F.2d 1528 (9th Cir. 1985). The Ninth Circuit issued a

corrected opinion on April 15, 1985. See Appendix at 1a. The opinion of U.S. District Court for the Eastern District of Washington, the Honorable Robert J. McNichols, issued on September 13, 1982, is unreported and appears in the Appendix at 53a.

JURISDICTION

This case was decided and judgment was entered by the Ninth Circuit on February 22, 1985. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Carolyn Grove, at the time this proceeding commenced, was the mother of two children enrolled in the Mead

School District. Her daughter, Cassie, was enrolled in the Mead School District High School as a Sophomore for the 1979-1980 school year. Her son, Sam, was enrolled in an elementary school in the Mead District at that time. Cassie has subsequently graduated from Mead High School. Sam will be enrolled as a Sophomore in Mead High School in the upcoming 1985-1986 school year.

Warren and Sylvia Riddle are taxpayers and citizens residing in the Mead School District. They are also the parents of school-aged children.

All of the petitioners and their children are fundamental, born-again Christians and members of the Foothills Community Church.

In the 1979-1980 school year, Cassie was enrolled in a course required for graduation, Sophomore English, taught by Mr. Ron Chadwick. Mr. Chadwick had the choice of several novels to use in his course. His original plan was to use a novel about American Indians in the course, but the district did not possess enough copies of this book, so he decided to use *The Learning Tree* in its place. Although the teacher had the authority to order additional copies of the desired novel, *When Legends Die*, he decided not to do so.

On the day Cassie was assigned the novel, she took it home to finish her assignment of reading the first several chapters. After reading the first twenty to thirty pages, she took the book to her mother questioning whether she should read it in light of their religious beliefs.

Her mother immediately read through some of the passages indicated by her daughter and told Cassie that she should not finish the book and that she would talk to the teacher. (Within the next day or two, Mrs. Grove read the entire book confirming her initial opinion that it would

seriously violate her faith to allow Cassie to read the novel.)

The next morning Mrs. Grove called the teacher and objected to the use of the book in her daughter's class. Mr. Chadwick informed Mrs. Grove that he would assign Cassie an alternative book, *Puddin' Head Wilson*, by Mark Twain.

Mr. Chadwick took Cassie out into the hall to discuss her mother's phone call. Cassie was informed by Mr. Chadwick that she could read the alternative book in the library or remain in class while the class discussed *The Learning Tree*. Not wanting to ostracize herself from the class any more than necessary, Cassie chose to remain in the classroom.

When Mr. Chadwick and Cassie returned into the classroom, with Cassie in plain view of the other students, Mr. Chadwick told the class that "some people had objected to the book" and that if anyone else "couldn't handle the book" they would be assigned an alternative as well. Mr. Chadwick repeated this type of belittlement in future days telling the class that if anyone was "too weak" to read this book he would find them an alternative also.

The other students knew he was referring to Cassie, as they began to ridicule her for refusing to read the assigned novel. The ridicule of Cassie begun by Mr. Chadwick was carried on by the students until the day that Cassie graduated from Mead High School in June, 1982.

When Carolyn Grove finished reading the novel, the day after it had been originally assigned, she decided that she needed to take further action in light of the content of novel and the ridicule to which the teacher had subjected her daughter. The book was so antagonistic to Christianity that she believed an alternative reader for her

daughter did not result in fair treatment for Christians or religious neutrality. She did not want her son, Sam, or other Christian children, to be assigned the book in the future only to suffer ridicule by both teachers and students if an alternative was requested.

Mrs. Grove employed the procedure instituted by the School District for review of materials to which there was objection. She requested that the book be removed from the curriculum of the mandatory Sophomore English Course. The initial review was conducted by staff members. Their decision to retain the novel as a part of the curriculum for the mandatory course was affirmed by the Superintendent and the School Board.

The School Board did require, however, the teachers to warn the students of the content of the book and to assign an alternative to any student who objected.

Mrs. Grove's objections to the novel were based upon her religious beliefs which her daughter shared. The defendants have never questioned the sincerity of their beliefs.

Her objections were that the novel's primary focus was the denigration of Jesus Christ, the Christian faith, and Christian people. Although this message was carried by a story line of a black adolescent[1] growing up in Kansas in

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[1] It was pointed out by the affidavit of Reverend Ed Udell, a black educator and minister, that the book was anti-Christian and denigrated blacks as well. Udell, the only black witness at the administrative hearing, as well as in the district court, contended that students in a virtually all-white school like Mead would get a warped view of black people by the use of this book. Udell contended that blacks were predominantly shown as uneducated, foul-mouthed, and anti-Christian. He contended that such a portrayal was discriminatory against both his race and his religion.

the 1930's, the central theme of the book was anti-Christian.

She pointed out that one character in the book declares: "I'm goin' to blow the ass off of Jesus Christ, that long-legged white son-of-a-bitch." Another character throws a picture of Jesus on the floor, contemptuously declaring Christ "a poor white trash God." She also complained that the word "God" is used as a swear word at least 46 times in the book. "God damn" appears 24 times. "Jesus Christ" is used as a swear word at least seven times.

She also pointed out that a great variety of words offensive to Christians were used countless times as profanities and obscenities. Such words included: "fuckin', screwin', shit, son-of-a-bitch, bastard, ass, pecker, peckerwood, etc."

But her central objection was not merely the words, but the story line which depicts a young boy rejecting the Christian faith in which he was raised and his destruction of his mother's faith in the process. She contended that the author's central purpose was to undermine the reader's belief in the Christian faith by denigrating Jesus Christ, Christians, churches, church leaders, and the Bible.

She indicated several passages from the book which demonstrated her objection to the material. (The concurring judge in the Ninth Circuit appended all of these passages to his opinion. They appear beginning at 31a in the Appendix.) However, four passages, Mrs. Grove alleged, give a succinct summary of the anti-Christian theme of the book.

1. A character named Marcus Savage is visited by a black pastor and members of a black Christian church on Christmas day. He is given a picture of Jesus by the visitors. He violently screams at them:

> "You and your white God git the hell out'a here!" he shouted. "I don't want no part of you soul savers—bendin' down like Paw says you do, kissing the feet of a poor white trash God."

App. at 43a.

2. The hero, a boy named Newt, says:

> "Why does our color make so much difference? Didn't God know that we'd have a lot of trouble if he made us black? . . . Since he's white, maybe he don't care either." He smiled wryly. "Never seen black angels . . . even the chariot horses are white."[2]

App. at 46a.

3. Sarah Winger, the hero's mother, and the second most important character in the book, says:

> "We been goin' to church all of our lives, and so has he [Newt]; still hearin' the same things we been hearin' since we was his age. The answers that used to satisfy us ain't goin' to satisfy Newt and the young ones comin' up now. They want proof. Some kind they can see and feel. And they're going to want more out of this world then we're gettin' out of it. Time's a changin', Jack."

App. at 39a.

4. Near the end of the book, Newt's mother has died and Newt is thinking about which of his adult sisters he wants to go live with. He says of one sister:

> "I like the way she fries potatoes, but she'd probably want me to go to church all the time. Sure had enough of religion to last me a long time."

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[2] This passage is so central to the theme of the book that the publisher uses this excerpt on the back cover of the book to give the reader some idea of the theme of the contents.

App. at 46a.

Despite Mrs. Grove's complaint, the school officials rejected her contention that the book violated the principle of religious neutrality. The Superintendent indicated that he believed that the constitutional requirements would require him to remove a "pro-religious" novel from the school, but that he could not remove an "anti-religious" novel.

This suit was subsequently filed on December 31, 1980, in the federal district court for the Eastern District of Washington after the administrative process had finally affirmed the book as a part of the curriculum for the mandatory course.

The book remains a part of the course curriculum and will be so when Sam Grove takes the course this coming school year.

The suit alleged that the civil rights of Mrs. Grove as the mother of Cassie, had been violated when her daughter was ridiculed by the teacher for refusing to read the assigned novel. She sought damages for this violation. She also alleged that the Free Exercise Clause and the Establishment Clause were violated by the use of the novel because of its blatant anti-Christianity and, alternatively, that it promoted the religion of Secular Humanism. She sought declaratory and injunctive relief against the school district to prohibit further violations of the Religion Clauses by the use of this novel.

The defendants were the members of the school board, and the superintendent. The teachers' union for the district, the Mead Education Association, was permitted to intervene as a defendant.

There was evidence submitted to the district court that other students had experienced similar teacher and peer

ridicule and pressure for refusing to read *The Learning Tree*. One student's parents had requested that their daughter be assigned an alternative reader. She, like Cassie, remained in the class. But unlike Cassie, without her parents' knowledge, she succumbed to the pressure to be like her peers and told the teacher that she would join them in reading the disputed novel. Another student was told that if he requested an alternative book, he would be required to stay after school to discuss the second book with the teacher. Since he was on the basketball team, this would have required him to miss practice and forfeit his place on the team. He chose to remain on the basketball team, read no novel at all, and took the test on *The Learning Tree* without having read it.

By order of June 9, 1982, the district court established a somewhat novel procedure for bringing the matter to trial. All direct testimony by all parties was required to be filed in the form of written affidavits. The parties agreed that the district judge should read the novel in connection with the upcoming trial on the merits.

On August 9, 1982, the defendant-intervenor filed a motion to dismiss on the pleadings. A similar motion to dismiss for lack of standing was filed by the school district on August 13, 1982.

Plaintiffs' "direct testimony" affidavits were filed, unsigned, on August 30, 1982, not for the purpose of opposing the motion, but in compliance with the pre-trial order requiring all direct testimony to be in that form. On September 8, 1982, the petitioners filed their opposition to the motions for dismissal.

On September 13, 1982 petitioner's signed affidavits were all filed. On that same date, the trial court conducted a hearing on the motions to dismiss. By oral opinion of

that date, the district court dismissed the cause of action. A written memorandum opinion followed on September 28, 1982.

The Ninth Circuit Court of Appeals affirmed the decision on Feb. 22, 1985. Both courts treated the case as if the only object of the suit was to remove the novel from the curriculum of the mandatory course. Both gave, at best, short shrift to the claim of civil rights violation stemming from the ridicule of Cassie for refusing to read the assigned novel.

Petitioners made a timely motion for extension of time to file a Petition for a Writ of Certiorari in accordance with Supreme Court Rule 29.3. Mr. Justice Rehnquist, acting in his capacity as Circuit Justice for the 9th Circuit, granted the time extension to file a Petition for Writ of Certiorari until and including June 21, 1985. Justice Rehnquist granted this motion on May 15, 1985.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW NOT YET SETTLED BY THIS COURT.

Circuit Judge Canby, in his concurring opinion said, "Because plaintiffs pose a novel problem, however, in the delicate area of church-state relations, I write separately to amplify my views on this matter of first impression." App. at 13a, 753 F.2d at 1535.

This case does raise a fundamental question of first impression: Is the doctrine of religious neutrality, which has been used to eliminate any hint of religion in the public schools, a one-sided doctrine, or does it apply equally to anti-religious material and activity?

This Court has often proclaimed that "[t]he government is neutral, and while protecting all, it prefers none and it *disparages* none." *Abington* v. *Schempp*, 374 U.S. 203, 215 (1963). (Emphasis in original.) In the same case, this Court declared, "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *Id.* at 225. (Citation omitted.)

However, one Humanist commentator has suggested that such statements were insincere. Commenting upon Justice Clark's majority opinion in *Schempp*, the commentator wrote:

> Clark was careful to mollify the pious by saying: "It certainly may be said that the Bible is worthy of study for its literary and historical qualities."

Paul Blanshard, "Three Cheers For Our Secular State," *The Humanist*, Mar.-Apr. 1976, p. 21.

When the public schools of the country are, by decisions of this Court, prohibited from leading students in vocal prayer,[3] authorizing a moment of silent prayer of meditation,[4] reading a chapter from the Bible without comment,[5] or posting the Ten Commandments,[6] many have begun to wonder whether religious neutrality is a guise for throwing Christianity out of schools while allowing

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[3] *Engel* v. *Vitale*, 379 U.S. 421 (1962).

[4] *Wallace* v. *Jaffree*, ____ U.S. ____, No. 83-812, decided June 4, 1985.

[5] *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963).

[6] *Stone* v. *Graham*, 449 U.S. 39 (1980).

antagonistic philosophies to fill the vacuum. Lower federal courts have made similar rulings against Christian practices. They have held that laws which permit both the theory of evolution and creation science to be taught side by side are unconstitutional.[7] Public cynicism about the doctrine of "religious neutrality" only increases.

Is religious neutrality a cruel hoax? Have all of the declarations indicating that religious neutrality requires equal treatment of material that is religious or anti-religious been empty promises? Have, as the humanistic commentator gleefully suggested, all of the Court's statements been efforts to "mollify the pious?"

The decision of the Ninth Circuit Court of Appeals in this case emasculates this Court's doctrine of religious neutrality. The decision below adheres to all of this Court's decisions which have eliminated pro-religious activity and material from the public school, while totally ignoring the repeated declarations of this Court that neutrality requires equal treatment for activity and material which disparages religion. The Ninth Circuit has turned the Establishment Clause into a cruel hoax, using the sword against material which would call Jesus Christ the Son of God, while using a shield to protect material which calls Jesus Christ a long-legged white son-of-a-bitch.

This case for the first time raises the sword of religious neutrality and asks that it be applied to anti-religious material in the same manner it has been repeatedly applied to pro-religious material. If Madalyn Murray O'Hair's son had the right to see the Bible and the Lord's Prayer removed from the public schools of this country to

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[7] *McClean* v. *Arkansas Board of Education*, 529 F. Supp. 1255 (D. Ark. 1982); *Aguillard* v. *Treen*, (E.D.LA.) No. 81-4787, Jan. 10, 1985 (unpublished) on appeal to 5th Cir., 85-3030.

avoid the possibility that he might be ridiculed,[8] then equality and true religious neutrality demand that Carolyn Grove's daughter receive similar constitutional protection when she is assigned a text which calls Jesus Christ a "long-legged white son-of-a-bitch" and a "poor white trash God."

This Court has never decided a case involving allegations of the teaching of anti-Christianity or anti-religion in the public schools. For the first time, this Court has the opportunity to put "flesh on the bones" of one side of the doctrine of religious neutrality which will give life to the previous dicta concerning the neutrality of the Court's doctrines and decisions.

If the Ninth Circuit's decision is not reviewed by this Court and reversed, this Court will give considerable credence to the argument that religious neutrality is not neutral, but is a sword having only one edge.

Another novel twist in this case is the Ninth Circuit's functional analysis which gave one definition of "religion" for Free Exercise Clause purposes and another definition of "religion" for Establishment Clause purposes. The First Amendment, of course, uses the word religion only once, presumptively its meaning does not change in mid-sentence. This analytical model could have far-reaching and mischievious consequences far beyond the context of this case if it is not reviewed and reversed by this Court.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE PRINCIPLES ESTABLISHED BY THIS COURT.

While this Court has never decided a case directly involving material alleged to violate the Free Exercise

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[8] *Murray* v. *Curlett*, 374 U.S. 203 (1963).

Clause and Establishment Clause because of its anti-religious nature, the direct and applicable principles enunciated by this Court in several areas were studiously ignored by the Ninth Circuit. Review is necessary to bring this case in line with these principles.

A. The Ninth Circuit Failed To Comply With This Court's Decisions Requiring That Evidence Be Construed In The Light Most Favorable To The Non-Moving Party For The Purposes Of Summary Judgment.

While the school district and the teacher's union moved for dismissal on the pleadings, the district court converted the motion to one for summary judgment by considering the contents of the disputed novel and the trial affidavits submitted by Mrs. Grove and the Riddles. The defendants submitted no counter-affidavits of any kind.

Thus the uncontroverted record before the district court were the allegations of Mrs. Grove, Cassie Grove, her pastor, a black minister, and others, all of which recited facts supporting the proposition that the novel disparaged and ridiculed Christianity.

Cassie and Carolyn Grove's affidavits that Cassie had been subjected to public ridicule by the teacher for refusing to read the book were likewise uncontroverted.

Thus there were two functional questions before the district court which should have required this matter to go to trial: (1) Does the novel *The Learning Tree* disparage Christianity? and (2) Was Cassie Grove ridiculed by her teacher for refusing to read the assigned text?

Material which disparages Christianity violates the Establishment Clause every bit as much as material which promotes Christianity. *Abington* v. *Schempp*,

supra.[9] Likewise, a student who is ridiculed because of her religion has suffered an equal constitutional violation as the student ridiculed because of his lack of religious faith. *Id.*[10]

This Court has repeatedly held that evidence from the pleadings, affidavits, depositions and exhibits must be construed in the light most favorable to the party opposing a motion for summary judgment. *Board of Education* v. *Pico*, 457 U.S. 853, 872 (1982); *Bishop* v. *Wood*, 426 U.S. 341, 347 (1976); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468 (1962).

Thus both the district court and the court of appeals should have treated the uncontroverted affidavits of the petitioners as true for the purposes of the motion for summary judgment. For the purpose of the motion this case should have been decided with the presuppositions that: (1) a central theme of the book was the disparagement of Christianity and (2) Cassie Grove was publically ridiculed by her teacher for objecting to the assigned novel.

As to the Free Exercise claim, the majority opinion makes no mention whatsoever of the fact that Cassie Grove had been ridiculed by the teacher. Thus the statement, "We agree with the district court's finding that no coercion existed." App. at 9a, 753 F.2d at 1533, is facially erroneous.[11] Coercion exists whenever a teacher ridicules a child in the classroom for objecting to a text that violates

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[9] We discuss this proposition more fully below in part II-B.

[10] This issue is discussed in more detail in part II-C.

[11] See Section II-C.

that child's religious convictions. There are enormous pressures of social conformity even without ridicule, but with it, there is no question that the school has applied coercion to get the child to read the novel in violation of her religious convictions.

As to the Establishment Clause claim, the court of appeals said:

> The central theme of the novel is life, especially racism, from the perspective of a teenage boy in a working class black family. Comment on religion is a very minor portion of the book. Its primary effect is secular.

App. at 10a, 753 F.2d at 1534.

The conclusion of the court of appeals that the primary effect of the book is secular is predicated on two factual presuppositions: (1) the central theme of the book is life, etc. and (2) comment on religion is a very minor portion of the book. These are both factual questions which are directly controverted by the lengthy affidavits of the petitioners and their witnesses. These affidavits contend that the central theme of the book is the disparagement of Christianity in the minds of young people. They also contend that comment upon religion is a very substantial part of the book.

The concurring judge in the court below said of our claim that *The Learning Tree* disparages or inhibits Biblical Christianity:

> There is, at least initially, apparent merit to this claim. When the work does discuss religion, it does so in a fashion which generally denigrates the figure Jesus and casts doubt upon much fundamentalist doctrine—from the efficacy of prayer to the inerrancy of Scripture and benevolence of God. . . .

> Nevertheless, in the context presented, these passages do not offend the establishment clause.

App. at 25a, 753 F.2d at 1541.

It would seem that if a claim has "initial apparent merit" it should be able to survive a motion for summary judgment. The reasoning of both the majority and the concurrence is founded upon their weighing the evidence in light of their personal views of the book, as opposed to the required standard of weighing the evidence in the light most favorable to petitioners. This error alone justifies review by this Court and reversal of the Ninth Circuit's decision.

In a decision issued June 18, 1985, the Sixth Circuit Court of Appeals reversed a federal district court's entry of summary judgment in a similar textbook dispute. In *Mozert* v. *Hawkins County Public Schools*, No. 84-5317, the court held that it was improper to grant summary judgment to the school district when there was a factual dispute as to whether the textbooks violated the religious beliefs of the parents and students as alleged. Although that case arose under the Free Exercise Clause, because students were being expelled for refusing to read the required texts, there is no distinction for the purpose of the procedural rules of summary judgments between Free Exercise Clause cases and Establishment Clause cases. The Sixth Circuit clearly supported the proposition that the religious or non-religious content of text books is a factual question requiring full consideration by the trial court. The court said:

> In the instant case, appellants have asserted that their religious beliefs are sincerely held and that the Holt books present ideas which oppose and/or contradict these beliefs. They contend that their religion

> requires that they not be exposed to such beliefs. They further allege that the appellant children were required to participate in the Holt reading program and that refusal to participate would lead to expulsion. Appellees have denied that appellants' religious beliefs were sincerely held and that exposure to the Holt books offends such beliefs. A factual issue must be resolved on remand by the district court with appropriate findings of fact and conclusions of law.

Mozert, supra, slip op. at 6-7.

Petitioners have raised similar factual matters as to the nature of the content of the novel in the Mead District. It was erroneous for the Ninth Circuit to fail to give the required weight to the contention of the Petitioners that the novel's central theme disparaged Christianity.

B. The Ninth Circuit Failed To Recognize The Inherent Differences Between Material Which Promotes Religion And Material Which Disparages Religion In Its Superficial Analysis Of The Establishment Clause Claim.

The majority in the court of appeals held that the challenge to the alleged anti-Christian novel was not comparable to the decisions of this Court ousting pro-religious materials because "[a]t issue here is not a ritual but students reading 'a novel with autobiographical overtones'. . . ." App. at 10a, 753 F.2d at 1534. No rationale ever advanced by this Court permits a distinction for Establishment Clause purposes between "rituals" and "novels with autobiographical overtones."

Were the Ten Commandments in *Stone* v. *Graham*, used in a ritual? No, they were merely posted. Were the chapters of the Bible in *Schempp* used in a ritual? No, the Bible was read without comment. This Court found an Establishment Clause violation not because of the pres-

ence of any religious ritual, but because the content of the material itself was religious.

If the doctrine of religious neutrality is to have any vitality whatsoever, there must be a common sense realization that anti-religion[12] by definition will not use rituals. If public school officials purposefully decided to disparage the faith of their Christian students, how would they do it? Would they dress the teachers in robes and have them chant anti-Christian slogans? Would they make students recite an "un-prayer" reverently committing their day to the proposition that there is no God? Would they have a ceremony where children snuff out candles and curse the darkness? Obviously not.

One humanist educator has openly declared the methodology which may be used to advance the cause of anti-religion.

> I am convinced that the battle for humankind's future must be waged and won in the public school classroom by teachers who correctly perceive their role as proselytizers of a new faith: a religion of humanity that recognizes and respects the spark of what theologians call divinity in every human being.

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[12] We respectfully disagree with the concurring judge's suggestion that petitioners divide the world into only two camps—the religious and the anti-religious. App. at 15a. 753 F.2d at 1536. In the arena of textbooks, we would agree with the concurring judge that books may, for Establishment Clause purposes, be religious, anti-religious, or non-religious. Books which are religious, we would suggest, are those which promote a religion. Books which are anti-religious are those which disparage a religion. Books which are non-religious either avoid the subject altogether or treat the subject of religion in an objective manner. The vast majority of books would fall into the non-religious category. The complaint lodged in this case is not merely that *The Learning Tree* is non-religious, we believe that it is anti-religious, that is, it directly disparages the Christian faith.

> These teachers must embody the same selfless dedication as the most rabid fundamentalist preachers, for they will be ministers of another sort, utilizing a classroom instead of a pulpit to convey humanist values in whatever subject they teach, regardless of the grade level—preschool day care or large state university. The classroom must and will become an arena of conflict between the old and the new—*the rotting corpse of Christianity,* together with all its adjacent evils and misery, and the new faith of humanism, resplendent in its promise of a world in which the never-realized Christian ideal of "love thy neighbor" will finally be achieved. (Emphasis added).
>
> . . .
>
> It will undoubtedly be a long arduous, painful struggle with much sorrow and many tears, but humanism will emerge triumphant. It must if the family of humankind is to survive.

John Dunphy, "A Religion For A New Age," *The Humanist,* Jan-Feb 1983, p. 26.

It is obvious from this passage that those who openly espouse the theory that Christianity is a "rotting corpse" view the public school teacher as a potential minister of their "faith" of anti-Christianity.

The same magazine, *The Humanist,* has also declared that adolescent literature, the very kind of textbook in question here, is a type of material conducive to promoting these anti-religious values.

> Something wonderful, free, unheralded, and of significance to all humanists is happening in the secondary schools. It is the adolescent literature movement. Virtually non-existent ten years ago, courses in adolescent literature are now *de rigueur* for the training of English teachers, librarians, and reading specialists.
>
> . . .

> Among the many themes of adolescent literature are mental illness, homosexuality, pregnancy, divorce, family conflict, racism, socio-economic problems, boy-girl relationships, rebellion, and injustice. None of the books are didactic, *but all of them espouse humanistic ideals to which young people should be exposed.* (Emphasis added.)

Sheila Schwartz, "Adolescent Literature: Humanism Is Alive and Thriving in the Secondary School," *The Humanist*, Jan.-Feb. 1976, p. 37.

Thus when the proponents of anti-Christianity declare that they intend to use public school teachers as "ministers of another sort" and adolescent literature to transmit their value system, it should become obvious that material in the public school which has the primary effect of disparaging religion will not be in the form of some kind of ritual.

The fact that this novel is adolescent literature provides no legal justification that, *ipso facto*, it cannot be deemed anti-religious for Establishment Clause purposes. Neither does it necessarily mean that all adolescent literature is anti-Christian or anti-religious. Whether a particular novel disparages religion or not is a factual question. We have already pointed out that there were sufficient allegations concerning the anti-Christian nature of *The Learning Tree* to survive a motion for summary judgment.

The court of appeals' simplistic reasoning that since novels are not rituals, there is no Establishment Clause violation, overlooks the reality of the inherent differences between promotion of religion and the disparagement of religion.

Novels which have the central theme of disparagement of religion should be construed to violate the Establish-

Novels which have the central theme of disparagement of religion should be construed to violate the Establishment Clause. Any contrary holding elevates the form of school material over its substance.

C. The Ninth Circuit Erred By Ignoring The Ridicule Of Cassie Grove In Evaluating The Free Exercise And 42 U.S.C. § 1983 Claims.

There is no mention whatsoever of the ridicule of Cassie Grove in the majority opinion of the court of appeals. Such ridicule, we would submit, constitutes a *per se* violation of the Free Exercise Clause.

This Court has held that the Free Exercise Clause is violated when government action acts in a coercive fashion against a person's religious beliefs. See, e.g., *West Virginia* v. *Barnette*, 319 U.S. 624 (1943); *Thomas* v. *Review Board*, 450 U.S. 707 (1981). This Court has noted that coercion of conscience may occur when the imprimatur of the state rests in favor of a religious faith.

> That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

McCollum v. *Board of Education*, 333 U.S. 203, 227 (Frankfurter, J.) (1948). An equally unconstitutional coercion of conscience occurs when the imprimatur of the state rests *against* a religion as well.

In *McCollum*, the Court was addressing an Establishment Clause case, but the coercive effect of ridicule of a student by a teacher ignores the neat dichotomies of Establishment and Free Exercise. If Cassie Grove has

the right to have an alternative reader as a result of her religious objection to the novel, which the school's action concedes, then she has the right to be free from ridicule for exercising that right.

The logic of this Court's statement in *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962) concerning the coercive effect of government pressure upon one's conscience applies with full force to this case.

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

In *Engel* and *McCollum*, this Court was dealing with situations of potential or indirect coercive pressure to conform. The ridicule faced by Cassie Grove was not merely a potential, it was very real. Thus not only was the Free Exercise Clause violated, there was an actionable violation of 42 U.S.C. § 1983 giving rise to a claim for damages. Such a claim has been made, but was totally ignored by the Court of Appeals. Review is necessary to reverse this obvious error.

D. The Ninth Circuit Improperly Dismissed The Claim Of Establiishment Of The Religion Of Secular Humanism.

The court of appeals majority opinion devotes a single three-sentence paragraph in a perfunctory dismissal of the petitioner's claim that the use of the novel established the religion of Secular Humanism. This Court has indicated that Secular Humanism may be considered a religion for the purposes of the First Amendment. *Torcaso* v. *Watkins*, 367 U.S. 488, 495, n.11, (1961).

The rationale of the appellate panel for this holding is the following single sentence: "*The Learning Tree*, however, was included in a group of religiously neutral books in a review of English literature." App. at 11a, 753 F.2d at 1534. The majority opinion does not explain this somewhat cryptic comment. Insight can be gained by the discussion of this point in the concurring opinion. The concurring judge says, at one point, "we must examine the work as a whole in the context of the entire curriculum." App. at 23a, 753 F.2d at 1540.

Apparently the majority was saying since this is only one book in the curriculum, and there were no allegations that all the material in the course advanced the religion of Secular Humanism, then the claim of an Establishment Clause violation must be dismissed.

This theory is not only unsupported by any reasoning, it is unsupported by any citation of any authority from any court. Why didn't this Court in *Stone* v. *Graham* consider the posting of the Ten Commandments in the context of all of the material posted on the bulletin boards in Kentucky Schools? Why didn't the Court in *Schempp* consider the reading of one chapter of the Bible without comment in the context of all the other material read in the schools?

The mere fact that only one book in the entire curriculum violates the Establishment Clause does not save that book. Other neutral books do not somehow balance out the violation.

If the use of *The Learning Tree* has the primary effect of advancing the religion of Secular Humanism, then it constitutes no defense that all of the other books in the curriculum are scrupulously neutral.

Although the majority opinion does not discuss this proposition, the concurring opinion forthrightly suggests

that the court of appeals' decision relative to Secular Humanism is supported by the theory that the term "religion" has one meaning for Establishment Clause purposes and another meaning for Free Exercise Clause purposes. App. at 17a, 753 F.2d at 1537. Thus, while Secular Humanism may be a religion for Free Exercise purposes, it is not a religion for Establishment Clause purposes.

The concurrence suggests that those who hold to the religion of Secular Humanism have the benefit of the Free Exercise Clause's protection, without the burden of the Establishment Clause's limitations.

If this radical proposition is true, then Secular Humanism becomes by judicial fiat the preferred religion of this country. Those who adhere to the faith may claim to be religious whenever they want protection from government intrusion, but may use the public schools and other agencies of government at will to promote their religion by the neat definitional trick advanced by the court of appeals.

While the majority did not embrace this proposition openly, their sparse reasoning suggests that the concurrence was interpreting and explaining the rationale actually employed, but not stated, by the majority.

It is a very dangerous proposition to the balance of religious liberty inherent in the two Religion Clauses to suggest that religion means one thing for Establishment Clause purposes and quite another for Free Exercise purposes.

Petitioners adequately plead an Establishment Clause violation of the establishment of the religion of Secular Humanism. They should be allowed to present their case

to the trier of fact to obtain a factual determination on this issue.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

MICHAEL P. FARRIS
Counsel of Record for Petitioners

JORDAN W. LORENCE
Staff Attorney

June 21, 1985

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3690
DC# CV 80-511 RJM

CAROLYN GROVE, WARREN RIDDLE, and
SYLVIA RIDDLE,
Plaintiffs-Appellants,

vs.

MEAD SCHOOL DISTRICT No. 354, *et al.*,
Defendants-Appellees.

No. 83-3784
DC# CV 80-511 RJM

CAROLYN GROVE, WARREN RIDDLE, and
SYLVIA RIDDLE,
Plaintiffs-Appellees,

vs.

MEAD SCHOOL DISTRICT No. 354, *et al.*,
Defendants,

and

MEAD EDUCATION ASSOCIATION,
Defendant-Intervenor-Appellant.

FILED
APR 15 1985

FILED
APR 24 1985

ORDER CORRECTING OPINION

Before: WRIGHT, PREGERSON, and CANBY, Circuit Judges.

The court's opinion in this case filed on February 22, 1985, is corrected as follows:

In 753 F.2d at page 1532, in place of the three paragraphs under headnotes 8 through 12, (beginning at page 4, line 25, and concluding on page 5, line 15, of the original manuscript), [App. page 6] substitute the following:

Whether the Riddles as taxpayers may bring an establishment clause challenge is not simply answered. The Supreme Court has made it clear that a federal taxpayer has no standing to maintain a purely religious objection to federal expenditures. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 478 (1982). *But cf.* K. Davis, 4 *Administrative Law Treatise* § 24:25 (2d ed. 1983). Similarly, a state taxpayer has been held not to have standing to assert a purely religious objection to Bible reading. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

On the other hand, municipal taxpayers have traditionally been held to have standing to assert objections to municipal expenditures. *See Massachusetts* v. *Mellon*, 262 U.S. 447, 486 (1923). The First Circuit concluded, in a case subsequently reviewed on the merits by the Supreme Court, that *Valley Forge* did not change the rule that a municipal taxpayer could assert a religious objection to a city's use of public resources, there the maintenance of a creche on city property. *Donnelly* v. *Lynch*, 691 F.2d 1029, 1031 (1st Cir. 1982), *rev'd*, 104 S.Ct. 1355 (1984). *See also Conrad* v. *City and County of Denver*, 656 P.2d 662, 669 (Colo. 1982); *Fausto* v. *Diamond*, 589 F. Supp. 451, 460 n.5 (D.R.I. 1984).

We need not resolve the question of the Riddles' taxpayer standing here, however, because Grove has standing to pursue the establishment clause claims. We therefore may proceed to the merits. *See, e.g., Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 (1981); *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

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and

MEAD EDUCATION ASSOCIATION,
Defendant-Intervenor-Appellant.

OPINION

Appeal From The United States District Court
For The Eastern District Of Washington
Chief District Judge Robert J. McNichols, Presiding

F I L E D
FEB 22 1985

[Argued and submitted September 4, 1984]

Before: WRIGHT, PREGERSON, and CANBY, Circuit Judges.

WRIGHT, Circuit Judge:

At issue here is a school board's refusal to remove a book from a sophomore English literature curriculum based on plaintiffs' religious objections to the book. Plaintiffs brought this civil rights suit arguing that use of the book violates the religion clauses of the First Amendment.

The district court granted summary judgment to defendants, finding no violation of the Constitution. We also must decide whether plaintiffs have standing to bring this suit, whether they were given adequate notice that the district court was considering a grant of summary judgment, and whether attorneys' fees should have been awarded to the defendant intervenor.

FACTS

Cassie Grove was assigned *The Learning Tree*, by Gordon Parks, in her public school sophomore English literature class. She read part of it, found it offensive to her religious beliefs, and showed it to her mother. Her mother read the entire book and agreed.

The Groves informed the teacher of their objections and Cassie was assigned another book. She was given permission to leave during classroom discussion of *The Learning Tree*, but chose to remain.

Mrs. Grove (hereinafter Grove) filed a formal complaint concerning the book with the school district. An evaluation committee concluded that *The Learning Tree* "is an appropriate element of the sophomore English curriculum." Grove and the Riddles, taxpayers, appealed to the Board of Directors of the school district. After a hearing, the Board denied the request to remove the book from the curriculum.

Plaintiffs then brought this civil rights suit under 42 U.S.C. § 1983 against the school district. They contend that use of *The Learning Tree* violated the religion clauses of the First Amendment. They seek damages and injunctive relief. The Mead Education Association, bargaining representative for the district teachers, was allowed to intervene as a defendant.

The defendants filed motions to dismiss in district court. After reading plaintiffs' affidavits and the book and conducting a hearing, the judge granted summary judgment for the defendants and denied their requests for attorneys' fees.

ANALYSIS

I. STANDING

If the plaintiffs lack standing to bring this suit, the courts lack jurisdiction to consider it. *Allen* v. *Wright*, 104 S.Ct. 3315, 3324-25 (1984). To satisfy constitutional standing requirements, a plaintiff must allege distinct personal injury that is fairly traceable to the challenged conduct and likely to be redressed by the requested relief. *Id.* at 3325. Prudential limitations on the exercise of jurisdiction include a general prohibition on a litigant's raising another's rights. *Id.* at 3324-25.

A. Free Exercise Claims

Appellants have standing to challenge alleged violations of the free exercise clause of the First Amendment only if they claim infringement of their personal religious freedom. *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961).

One aspect of the religious freedom of parents is the right to control the religious upbringing and training of their minor children. *See Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). As a parent, Grove has a direct, personal right to direct Cassie's religious training. *Collins* v. *Chandler Unified School District*, 644 F.2d 759, 764 n.1 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981).

The Riddles present no claim of violation of a personal right of religious freedom. In the complaint, their only interest is identified as their taxpayer status. Appellants assert that the Riddles are the parents of school-age children in the district, but not that the children have attended public school there. The Riddles do not have standing to pursue their free exercise claims.

B. Establishment Claims

Appellants have standing to challenge alleged violations of the establishment clause of the First Amendment if they are directly affected by use of *The Learning Tree* in the English curriculum. *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963). Grove has standing as a parent whose right to direct the religious training of her child is allegedly affected. *See Wisconsin* v. *Yoder*, 406 U.S. 205; *Abington School District*, 374 U.S. at 224 n.9.

As taxpayers, the Riddles may bring an establishment clause challenge only if they show direct and particular economic detriment resulting from the disputed practice. *Doremus* v. *Board of Education*, 342 U.S. 429, 433-35 (1952). Standing is not established by a citizen's general interest in constitutional governance. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982).

Expenditure of public funds in an unconstitutional manner is not an injury conferring standing. *Id.* at 477. A religious objection to public expenditures will not confer taxpayer standing either. *Id.* at 478. The Riddles have alleged no more direct and particular injury that would confer standing.

Because the Riddles have not alleged that use of *The Learning Tree* caused them personal detriment, they have no standing to challenge it. We will consider Grove's claims only.

II. NOTICE OF CONSIDERATION OF MOTION FOR SUMMARY JUDGMENT

Grove contends that the district judge provided insufficient notice of his intent to treat defendants' pretrial motions as motions for summary judgment. She argues that she was denied an adequate opportunity to conduct discovery that would support her claims, in violation of due process.

Whenever a district court looks beyond the pleadings in evaluating a Rule 12(b)(6) motion to dismiss, the motion must be treated as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(b)(6); *Portland Retail Druggists Association* v. *Kaiser Foundation Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981). Before summary judgment may be entered, all parties must be given notice of the motion and an opportunity to respond. *Portland Retail Druggists*, 662 F.2d at 645. The opportunity to respond must include time for discovery necessary to develop facts justifying opposition to the motion. *Id.*; Fed. R. Civ. P. 56.

In this circuit, notice is adequate if the party against whom judgment is entered is "fairly apprised" that the court will look beyond the pleadings, thereby transforming the motion to dismiss into a motion for summary judgment. *Mayer* v. *Wedgewood Neighborhood Coalition*, 707 F.2d 1020, 1021 (9th Cir. 1983) (per curiam) (citing *Portland Retail Druggists*, 662 F.2d at 645). When a party is represented by counsel, formal notice may be unnecessary. *See Garaux* v. *Pulley*, 739 F.2d 437, 439-40 (9th Cir. 1984). Notice occurs when a party has reason to know that the court will consider matters outside the pleadings. *See Townsend* v. *Columbia Operations*, 667 F.2d 844, 849 (9th Cir. 1982).

A represented party who submits matters outside the pleadings to the judge and invites consideration of them has notice that the judge may use them to decide a motion originally noted as a motion to dismiss, requiring its transformation to a motion for summary judgment. *Id.*; *see Garaux*, 739 F.2d at 439.

Grove submitted matters outside the pleadings. On August 18 the parties agreed that the judge should then read *The Learning Tree*. On August 30 Grove submitted copies of affidavits of her witnesses. At the September 13 hearing the judge relied on the book and Grove's affidavits in deciding the motion. Grove had adequate notice that he would do so.

III. FIRST AMENDMENT

The grant of summary judgment is reviewable de novo. *National Union Fire Insurance Co.* v. *Argonaut Insurance Co.*, 701 F.2d 95, 96 (9th Cir. 1983). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Local school boards have broad discretion in the management of schools. *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). Judicial supervision of public education is limited to the resolution of conflicts that clearly involve constitutional values. *Id.*; *Nicholson* v. *Board of Education*, 682 F.2d 858, 863 (9th Cir. 1982).

Grove contends that the Board's refusal to prohibit use of *The Learning Tree* in high school English courses violated the First Amendment religion clauses. Those clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

A. Free Exercise of Religion

The free exercise clause recognizes the right of every person to choose among types of religious training and observance, free of state compulsion. *Abington School District*, 374 U.S. at 222. To establish a violation of that clause, a litigant must show that challenged state action has a coercive effect that operates against the litigant's practice of his or her religion. *Id.* at 223.

The state action at issue here is a school board policy of academic freedom and refusal to remove from the curriculum a

book that offends Grove's religious sensibilities. Three factors are relevant in our analysis: (1) the extent of the burden upon the exercise of religion, (2) the existence of a compelling state interest justifying that burden, and (3) the extent to which accommodation of the complainant would impede the state's objectives. *Callahan* v. *Woods*, 736 F.2d 1269, 1273 (9th Cir. 1984).

The burden on Grove's free exercise of religion was minimal. Cassie was assigned an alternate book as soon as she and Grove objected to *The Learning Tree*. Cassie was given permission to avoid classroom discussion of *The Learning Tree*. We agree with the district court's finding that no coercion existed.

The state interest in providing well-rounded public education would be critically impeded by accommodation of Grove's wishes.

> If we are to eliminate everything that is objectionable to any of [the religious bodies existing in the United States] or inconsistent with any of their doctrines, we will leave public education in shreds.

Florey v. *Sioux Falls School District 49-5*, 619 F.2d 1311, 1318 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (quoting McCollum v. Board of Education, 333 U.S. 203, 235 (1948) (Jackson, J., concurring)).

In light of the absence of coercion and the critical threat to public education, we conclude that the school board has not violated the free exercise clause. *Id.* at 1318-19.

B. Establishment of Religion

The establishment clause of the First Amendment requires government neutrality with respect to religion. *Abington School District*, 374 U.S. at 215. It was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970)).

To pass constitutional muster, challenged state action (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not foster excessive state entanglement with religion. *Lemon*, 403 U.S. at 612-13. The option of nonparticipation does not save state action from an establishment clause challenge. *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962).

Religious activities prohibited in public schools include daily readings from the Bible, *Abington School District*, 374 U.S. 203, recitation of the Lord's Prayer, *id.*, posting the Ten Commandments in every classroom, *Stone* v. *Graham*, 449 U.S. 39 (1980), beginning school assemblies with prayer, *Collins*, 644 F.2d 759, and teaching a Transcendental Meditation course that includes a ceremony involving offerings to a deity, *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979). The Supreme Court has stated clearly that literary or historic study of the Bible is *not* a prohibited religious activity. *Stone*, 449 U.S. at 42; *Abington School District*, 374 U.S. at 225. Not all mention of religion is prohibited in public schools.

Appellants contend that use of *The Learning Tree* in an English literature class has a primary effect of inhibiting their religion, fundamentalist Christianity, and advancing the religion of secular humanism. The district court concluded that use of the book was not a religious activity and that it served a secular educational function.

At issue here is not a ritual, but students reading

> a novel with autobiographic overtones used in the English literature class . . . for purposes of exposing students to expectations and orientations of Black Americans.

District Court Memorandum Decision at 4. The central theme of the novel is life, especially racism, from the perspective of a teenage boy in a working class black family. Comment on religion is a very minor portion of the book. Its primary effect is secular.

Secular humanism may be a religion. *See Rhode Island Federation of Teachers* v. *Norberg*, 630 F.2d 850, 854 (1st Cir.

1980). *The Learning Tree*, however, was included in a group of religiously neutral books in a review of English literature, as a comment on an American subculture. Its use does not constitute establishment of religion or anti-religion.

IV. ATTORNEYS' FEES

Defendant-intervenor Mead Education Association moved for an award of attorneys' fees below, under 42 U.S.C. § 1988. Its motion was denied. It cross-appeals that denial of fees and seeks an award of fees on appeal.

A defendant who prevails in a § 1983 action is awarded attorneys fees "only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." *Mayer* v. *Wedgewood Neighborhood Coalition*, 707 F.2d 1020, 1021 (9th Cir. 1983) (citing *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978)). Awards to intervenors should not be granted unless the intervenor plays a significant role in the litigation. *See Seattle School District No. 1* v. *State of Washington*, 633 F.2d 1338, 1349-50 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982); *see also Donnell* v. *United States*, 682 F.2d 240, 245-49 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983). A district court's denial of fees is reviewed for abuse of discretion. *Seattle School District No. 1*, 633 F.2d at 1349.

The Education Association did not play an exceptional role in this litigation. The district court's denial of attorneys' fees was not an abuse of discretion. Attorneys' fees on appeal are denied also.

AFFIRMED.

FILED
FEB 22 1985

CANBY, Circuit Judge (concurring):

I concur in Judge Wright's clear and concise opinion. Because plaintiffs pose a novel problem, however, in the delicate area of church-state relations, I write separately to amplify my views on this matter of first impression.

I. ESTABLISHMENT CLAUSE

[O]ne of the mandates of the First Amendment is to promote a viable, pluralistic society and to keep government neutral, not only between sects, but between believers and nonbelievers." *Walz* v. *Tax Commission*, 397 U.S. 664, 716 (1970) (Douglas, J., dissenting).[1] Plaintiffs do not dispute this goal. They claim, however, that *The Learning Tree* reflects a set of secular, if not anti-religious values—values which they denominate "secular humanism—so that inclusion of the book in the public secondary school curriculum violates this salutary principle of neutrality.[2]

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[1] Neutrality is designed to protect religion as well as government. "[A] union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962)

[2] Plaintiffs' position that government should be prohibited from establishing non-theistic ideologies in the schools, just as it is prohibited from establishing traditional theistic practices, is not without support. *See Abington School Dist.* v. *Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting) (viewing refusal to permit religious exercises as arguably the establishment of a "religion of secularism"); *Abington*, 374 U.S. at 306 (Goldberg, J., concurring) (warning that "untutored devotion to the concept of. . . noninvolvement with the religious" can be become "a brooding and prevasive devotion to the secular"). *See, e.g.*, Whitehead & Conlon, "the Establishment of the Religion of Secular Humanism and its First Amendment Implications," 10 Tex. Tech. l. Rev. 1 (1978); *but cf.* Davidow, "Secular Humanism as an Established Religion: A Response to Whitehead & Conlon," 11 Tex. Tech. L. Rev. 51 (1979).

The sincerity of plaintiffs' religious objections to *The Learning Tree* is not disputed, nor is the fact that the book deeply offends plaintiffs. Even accepting, however, that the work is antithetical to the particular Christian beliefs espoused by plaintiffs, its inclusion in the high school curriculum does not violate the establishment clause.

The first amendment prohibits the establishment of religion but does not define religion. Plaintiffs insist that *The Learning Tree* embodies the philosophy of secular humanism, and that secular humanism is a religion. There are substantial analytical difficulties with this contention, and with its underlying use of the term "secular humanism."[3]

A. Secularism As Religion

Plaintiffs frequently seem to regard "secular" and "humanist" as synonyms for "anti-religious."[4] The common meaning of those terms does not support the assumption. "Humanism,"[5] for example, is not necessarily incompatible with religion gen-

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[3] "[T]he use of this book constitutes the advancement of a religious doctrine called secularism, Secular Humanism, or humanism. . . . We believe that the terms 'secularism,' 'humanism,' and 'secular humanism' can be used interchangeably. . . ." Appellant's Brief 44 & 45.

[4] "Secular Humanism. . . is a religion dedicated to affirmatively opposing or showing hostility toward Christianity. It has declared its pulpit to be the public school classroom and its 'bible' is adolescent literature like *The Learning Tree.*" *Appellants' Brief 49.*

[5] Originally, "humanism" signified the recrudescence of interest in classical art and letters; a critical, liberal, and individualistic spirit; and the shift of emphasis from religious to secular concerns which blossomed during the Italian Renaissance. more generally, the term has come to signify any doctrine or set of values which rejects supernaturalism, asserts the essential dignity and worth of each human being, and commits itself to the achievement of individual self-realization and aggregate human welfare through reason and the scientific method. *See* 4 *Ency. of Philosophy* 69-72 (1967).

erally or with theistic commitments, including Christianity, in particular.[6] We assume, however, that the thrust of plaintiffs' attack is against nontheistic[7] humanism, which they might label "secular humanism."

The analytical difficulty with plaintiffs' approach is that it tends to divide the universe of value-laden thought into only two categories—the religious and the anti-religious. By adopting this dualistic social outlook, and by denominating the anti-religious half of their universe as "secular," plaintiffs erect an insurmountable barrier to meaningful application of the establishment clause to controversies like this one. Whether the inclusion of *The Learning Tree* in the curriculum violates the establishment clause depends, under *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971), upon whether that inclusion reflects a

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[6] Historically, "[f]or all its antipathy toward asceticism and theology, humanism did not have an antireligious or anti-Christian character. Its interest in defending the value and freedom of man drew it into discussing the traditional problems of God and providence. . . —discussions that were frequently concluded in much the same from as that accepted by the medieval tradition." *Ency. of Philosophy, supra* n. 5, at 71. More recently, a number of celebrated theologians have viewed humanism not as the antithesis, but rather as the apotheosis of religion. Karl Barth, for example, declared that "there is no humanism without the Gospel" *(cited in* 5 *ency. Brittanica* 199 (Micropaedia) (1982)); *see also* K. Barth, *The Humanity of God* (1960); H. Kung, *On Being a Christian* 530-602 (1974). Others are united in their general rejection of the God of traditional theism as a God "'up there,'" *Seeger*, 380 U.S. at 181, and adoption of a more personal, humanistic vision of religion. *See e.g.*, P. Tillich, *Systematic Theology* (1957) *(cited in Seeger,)* 380 U.S. at 180); *The Shaking of the Foundations* (1948) *cited id.*, 380 U.S. at 187); J. Robinson, *Honest to God* (1963) *(cited id.*, 380 U.S. at 181); D. Muzzey, *Ethics as a Religion* (1951) *(cited id.*, 380 U.S. at 182-83).

[7] Theism—exemplified by traditional Judaism, Christianity, and Islam—is the "belief in the existence of one God who is viewed as the creative source of man, the world, and value. . . ." *Webster's Third New International Dictionary* 2370 (1976).

secular purpose and produces a secular effect. The difficulty is that plaintiffs might well concede that the primary purpose and effect was secular; indeed, that is precisely their point.

It is apparent that so long as plaintiffs deem that which is "secular" in orientation to be anti-religious, they are not dealing in the same linguistic currency as the Supreme Court's establishment decisions. If the establishment clause is to have any meaning, distinctions must be drawn to recognize not simply "religious" and "anti-religious," but "non-religious" governmental activity as well. In the parlance of *Lemon* v. *Kurtzman*, "secular" must mean "non-religious." Therefore, plaintiffs cannot succeed in demonstrating a violation of the establishment clause by showing that the school authorities are somehow advancing "secular" goals.

Part of plaintiffs argument, however, is that secular humanism is itself a religion. They rely principally upon *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).[8] In *Torcaso*, the Supreme Court did assume without deciding that certain non-theistic beliefs, including secular humanism, were "religions" for purposes of the first amendment:

> Among religions in this country which do not teach what would generally be considered a belief of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others (citations omitted).

Id. at 495 n.11 (dictum). The apparent breadth of the reference to "Secular Humanism," however, is entirely dependent upon viewing the term out of context. In context, it is clear that the Court meant

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[8] The majority similarly suggests that "[s]ecular humanism may be a religion," citing *Rhode Island Federation of Teachers* v. *Norberg*, 630 F.2d 850, 854 (1st cir. 1980). *Norberg*, however, does not so hold. Instead, the First Circuit simply noted that even if secular humanism were to be so regarded, as plaintiffs urged, their suit to intervene nevertheless failed for failure to state a defense relevant to the challenged statute. *Id.* at 853.

> no more than a reference to the group seeking an exemption in *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 2d 673 (1957) which, although non-Theist in belief, also met weekly on Sundays and functioned much like a church. . . . Thus *Torcaso* does not stand for the proposition that "humanism" is a religion, although an organized group of "Secular Humanists" may be.

Malnak v. *Yogi*, 592 F.2d 197, 206 & 212 (3d Cir. 1979) (Adams, J., concurring).

Even if *The Learning Tree* is viewed as representative of what can fairly be characterized as "secular humanism," it remains an autobiographical novel only tangentially concerned with religion. The work "is still far removed from a comprehensive belief system laying claim to ultimate truth and supported by a formal group," *id.* at 212, which the Court was prepared to concede in *Torcaso* would constitute a religion. *See also Womens Services, P.C.* v. *Thone*, 483 F. Supp. 1022, 1034 (D. Neb 1979) (concluding that nontheistic beliefs are "religions" in constitutional terms only if characterized by tenets and organization).

Furthermore, in suggesting that secular humanism may be a religion, neither Torcaso nor plaintiffs distinguish between "establishment" and "free exercise."[9] *Torcaso* is a free exercise case. While the Supreme Court has embraced a concept of religion in the free exercise context sufficiently expansive to encompass nontheistic views,[10] there is much to be said for the view that the definition of religion should vary with the clause under review.

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[9] *See generally* J. Choper, "Defining 'Religion' in the First Amendment," 1982 U. Ill. L. Rev. 579, 581 & 604.

[10] *See United States* v. *Seeger*, 380 U.S. 163, 187 (1965); *Welsh* v. *United States*, 398 U.S. 333, 340 (1970) (plurality opin.) (both adopting functional definition, derived largely from Tillich, which treats as "religion" any set of beliefs addressing matters of "ultimate concern" occupying "a place parallel to that filled by . . . God' in traditionally religious persons." 398 U.S. at 340).

While a generous functional (and even idiosyncratic) definition best serves free exercise values, the same expansiveness in interpreting the establishment clause is simply untenable in an age of such pervasive governmental activity:

> To borrow the ultimate concern test from the free exercise context and use it with present establishment clause doctrines would be to invite attack on all programs that further the ultimate concerns of individuals or entangle the government with such concerns.

Note, "Toward a Constitutional Definition of Religion," 91 Harv. L. Rev. 1056, 1084 (1978); *see Int'l Soc. for Krishna Consciousness, Inc.* v. *Barber*, 650 F.2d 430, 439-40 (2d Cir. 1981) (Kaufman, J.). Thus, "a less expansive notion of religion [is] required for establishment clause purposes lest all 'humane' programs of government be deemed constitutionally suspect." L. Tribe, *American Constitutional Law* 827-28 (1978).[11]

In any event, it is sufficient here simply to point out that plaintiffs have not alleged facts showing anything remotely resembling an establishment of a religion of secular humanism. At issue is not the wholesale imposition of secular humanist dogma, however defined,[12] but the assignment in the second-

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[11] *But cf.* Justice Rutledge dissenting in *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 32 (1947): "'Religion' appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less. . ." *see also Malnak* v. *Yogi*, 592 F.2d at 210-13 (Adams, J., concurring).

[12] Plaintiffs' brief, however, leaves the distinct impression that their objection is less to Parks' novel *per se*, that to the public school curriculum itself—a curriculum which, as a result of Supreme Court rulings removing inculcation in religious doctine and dogma from the classroom, they perceive as "establishing" secularism. *See, e.g.*, Toscano, "A Dubious Neutrality: The Establishment of Secularism in

ary curriculum of a discrete work, *The Learning Tree* by Gordon Parks. In assessing whether inclusion of a work violates the establishment clause, conclusionary characterizations are of little aid in the inquiry. *See Lynch*, ___ U.S. at ___, 104 S.Ct. at 1361-62. Establishment clause analysis is necessarily fact-dependent. *Id.* We must apply the clause in light of the text of the book itself, and the manner of its use in the curriculum.

B. Entanglement, Purpose And Effect

In *Lynch* v. *Donnelly*, ___ U.S. ___, 104 S.Ct. 1355 (1984), the Supreme Court reaffirmed the relevance of what had generally been known as the *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), tripartite test.[13] Under *Lemon*, a state action or enact-

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the Public Schools," 1979 Brig. Young U. L. Rev. 177, 198. Plaintiffs, however, fail to distinguish the process of secularization from the promotion of secularism. *See* H. Cox, *The Secular City* 18 (1966). While the promotion of secularism as a body of anti-religious doctrine is prohibited by the establishment clause, *see Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952), the process of secularization has been the means of achieving compliance with the establishment clause: "It is generally said that the secularization of public education was brought about in order to prevent domination of the system by a prevailing religious sect." Comment, "Humanistic Values in the Public School Curriculum: Problems in Defining an Appropriate Wall of Separation," 61 Nw. U. L. Rev. 795, 803 (1966). *See also*, Gianella, "Religious Liberty, Nonestablishment, & Doctrinal Development (Part I)," 80 Yale L.J. 1381, 1386 (1967) ("original constitutional consensus concerning religious liberty was an outgrowth of Protestant dissent and humanistic rationalism, the viewpoints that dominated the thinking of the authors of the Constitution.").

[13] After *Lynch*, the opinion in *Lemon* is best understood as reflecting factors which may be central to any establishment clause analysis, rather than as articulating a single invariable test. "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, ___ *U.S. at* ___, *104 S. Ct. at 1362.*

ment does not violate the establishment clause if (1) it has a secular purpose; (2) its principal or primary effect is neither to advance nor inhibit religion; and (3) it does not foster excessive governmental entanglement with religion. *Id.* at 612-13. Although clarity, in the current context, would be aided by substituting "non-religious" for "secular," none of these factors supports a finding of impermissible establishment in this case.

In a somewhat novel twist on the issue of entanglement, plaintiffs claim that

> [t]his is not a case where we must show that the State has been too intertwined with religious agencies. In this case, the State *is* the agency of (anti-) religion. It is hard to become more entangled than that.

Appellants' Brief 44. This conclusion, however, is entirely dependent upon the fallacious dichotomy discounted above. *The Learning Tree* was neither purchased from nor provided by official humanist organizations. Nor does the work carry the imprimatur of these or similar religio-philosophical bodies.[14] There is no entanglement.

Nor was selection and subsequent retention of the work impermissibly sectarian. The Supreme Court

> has invalidated legislation or governmental action on the ground that a secular purpose was lacking . . . only when it has concluded that there was *no question* that the statute or activity was motivated *wholly* by religious considerations.

Lynch, ___ U.S. at ___, 104 S.Ct. at 1362 (emphasis added).

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[14] This is not to suggest that the formal imprimatur of a particular church or religious body is necessarily fatal under the establishment clause. Even the Bible, if appropriately presented may be included within the public school curricula. *See Abington*, 374 U.S. at 225. Similarly, the works of self-described humanists published in *The Humanist*, official organ of the American Humanist Association, and appended to appellants' brief may themselves be studied in the schools, subject to the same constraints.

Here, there is no question that the book was included within the curriculum for the entirely non-religious (*i.e.*, secular) and commendable purpose of exposing students to different cultural attitudes and outlooks.[15] In marked contrast to the orchestrated prayer, mandatory Bible reading, Decalogue, or creationism cases,[16] the record is devoid of any evidence that *The Learning Tree* was initially selected by Cassie's teacher or subsequently retained by Mead School District officials out of hostility toward Christianity or fealty to any secularist credo. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Lynch*, ___ U.S. at ___, 104 S.Ct. at 1368 (O'Connor, J., concurring). No such purpose has been shown.

The crux of plaintiffs' establishment claim is therefore that inclusion of *The Learning Tree* in the public schools has the primary effect of advancing the "religion" of secular humanism while inhibiting the plaintiffs' own religion of "Biblical Christianity." Plaintiffs, insist that "the book . . . clearly teaches anti-Christian concepts, values, and beliefs." Appellants' Brief 16. Assuming, *arguendo*, that this characterization is correct, and that such views are consistent with the "religions" of humanism or secularism, " 'not every law that confers an 'indi-

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[15] The district court found that "*The Learning Tree* is a novel with autobiographical overtones used in the English literature class of the school for the purposes of exposing students to expectations and orientations of Black Americans. It is also categorized as 'adolescent hero' literature. The book clearly serves a secular educational function."

[16] *Engel* v. *Vitale*, 370 U.S. 421 (1962) (mandatory reading of state-composed prayer); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963) (mandatory Bible reading at beginning of school day); *Stone* v. *Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments in classroom); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (prohibition against teaching principles of Darwinian evolution); *McClean* v. *Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982) (teaching of "creation-science").

rect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid.'" *Lynch*, 104 S.Ct. at 1364 (*citing Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 771 (1973)); *see Crowley* v. *Smithsonian Institution*, 636 F.2d 738, 742-43 (D.C. Cir. 1980). Total separation of church and state is simply impossible. *Lynch*, 104 S.Ct. at 1362. The first amendment is not violated merely because particular governmental activity "'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris* v. *McRae*, *448 U.S. 297, 319 (1980) (citing McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961).

The issue is *not* whether *The Learning Tree* embodies anti-Christian elements; I have assumed, *arguendo*, that it does. Instead, the issue is whether its selection and retention by school officials "communicat[es] a message of government endorsement" of those elements.[17] It is not the purpose of the public schools "to cultivate an official faith or ideology, whether religious or humanistic in character. . . ." Kauper, "Prayer, Public Schools and the Supreme Court," 61 Mich. L. Rev. 1031, 1066 (1963).[18] Yet even the Bible may occupy a place in the classroom, provided education and exposure do not become advocacy or endorsement. *Abington*, 374 U.S. at 225.

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[17] "[T]he effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. The laws upheld in *[Walz, McGowan* and *Zorach]* had such effects, but they did not violate the Establishment Clause. What is crucial is that a government practice not have the effect of communication a message of government endorsement or disapproval of religion." *Lynch*, 104 S.Ct. at 1368 (O'Connor, concurring).

[18] *Cf. West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.): "If there is one fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

In assessing whether inclusion of *The Learning Tree* communicates governmental endorsement or approval of its purportedly "anti-Christian" or "secular humanist" elements, we must first examine the work as a whole. *See Lynch*, 104 S.CXt. at 1362. The passages identified by plaintiffs are simply scattered references to religion in a much larger work depicting a poor, black adolescent's painful process of coming of age. Nor are these passages as much theology as anthropology, less commentary on religion than comment prompted by the frustrating confrontation of adolescents with evil, hypocrisy, and suffering. *See* Appendix. Indeed, while that distinction might be lost on third-graders, it is bound to be understood by Cassie Grove's classmates—high school sophomores confronting many of the same questions, and doubtless beginning to appreciate that many of the comforting assumptions and illusions of childhood are not always what they seemed.

Second, we must examine the work as a whole in the context of the entire curriculum.[19] Were the school board in Cassie's district to require local principals to read over their public address systems a resolution, drawn in words from the book, declaring Jesus Christ to be a "poor white trash God," or "a long-legged white son-of-a-bitch," Appendix, *infra* at 38, there would be little doubt that the effect would be to communicate governmental endorsement of anti-Christian sentiments.

By contrast, *The Learning Tree* bears the sole signature of its author, Gordon Parks. It is a work of fiction, not dogmatic philosophy. It is one book, only tangentially "religious," thematically grouped with others in the sophomore literature curriculum. Its purpose and effect is to expose students to the attitudes and outlooks of an important American subculture.

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[19] *Cf. Lynch*, 104 S.Ct. at 1369 (O'Connor, J., concurring): "[T]he overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, *though not neutralizing the religious content* of a religious painting, negates any message of endorsement of that content (emphasis added)."

Plaintiffs may be correct in suggesting that the work "hard[ly] . . . constitutes the objective study of Christianity," Appellants' Brief 22, yet objectivity in education need not inhere in each individual item studied; if that were the requirement, precious little would be left to read. Instead, objectivity is to be assessed with reference to the manner in which often highly partisan, subjective material is presented, handled, and "integrated into the school curriculum, where [even] the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S. at 49; *see Abington*, 374 U.S. at 225.

Luther's "Ninety-five Theses" are hardly balanced or objective, yet their pronounced and even vehement bias does not prevent their study in a history class' exploration of the Protestant Reformation, nor is Protestantism itself "advanced" thereby. The study of Greek mythology does not "advance" pantheism. Teaching about "the divine right of kings" does not endorse a particular dogma, although one is necessarily explored.[20]

Similarly, inclusion of *The Learning Tree* as representative of a particular literary genre neither religiously inhibits nor instills, but simply informs and educates students on a particular social outlook forged in the crucible of black rural life. To include the work no more communicates governmental endorsement of the author's or characters' religious views than to assign *Paradise Lost*, *Pilgrim's Progress*, or *The Divine Com-*

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[20] The divine right of kings is "[t]he doctrine that a monarch in the hereditary line of succession has a divine and indefeasible right to his kingship and authority. . . . The origin of the doctrine is closely linked with the contest between the Holy Roman Emperor and the medieval papacy. In England . . . [u]nder the Stuarts, . . . the doctrine was professed by most leading Anglican divines." *Oxford Dictionary of the Christian Church* 412 (F.L. Cross ed. 1974); *see also* J. Locke, *First Treatise of Civil Government* (1689); A.P. d'Entrevas, *Natural Law* (2d ed. 1970).

edy conveys endorsement or approval of Milton's, Bunyan's, or Dante's Christianity.[21]

Even though *The Learning Tree* does not "advance" secular humanism, it remains to consider whether the work "inhibits" fundamentalist or Biblical Christianity, as plaintiffs contend. There is, at least initially, apparent merit to this claim. When the work does discuss religion, it does so in a fashion which generally denigrates the figure of Jesus and casts doubt upon much fundamenalist doctrine—from the efficacy of prayer to the inerrancy of Scripture and benevolence of God. *See* Appendix. Nevertheless, in the context presented, these passages do not offend the establishment clause.

First, the work's purported hostility to religion may be more apparent than real. It is true that religious hypocrisy is one theme in the work. *See* Appendix. Yet the same might be said of both Jesus and the Old Testament prophets,[22] let alone such secular—and celebrated—authors as Chaucer, Voltaire, Paine, Twain, or Sinclair Lewis.[23] It is also true that the adolescent

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[21] *See Lynch*, 104 S.Ct. at 1379 (Brennan, J., dissenting) (referring to inclusion of the Bible or Milton's Paradise Lost in a course on English literature): "The purpose is plainly not to single out the particular religious beliefs that may have inspired the authors, but to see in these writings the outlines of a larger imaginative universe shared with other forms of literary expression (*citing* N. Frye, *The Secular Scripture* (1976));" *see also id.*, 104 S.Ct. at 1364 (no establishment despite "literally hundreds of religious paintings in governmentally supported museums").

[22] The converse of the call to repentance and righteousness, the condemnation of oppression, injustice, and hypocrisy dominates the prophetic canon. *See e.g.*, Isaiah 1:10-23; 9:17, 29:13; Micah 3:1-12; Jeremiah 6:13-15, 9:8-9; *see generally* J. Bright, *A History of Israel* (2d ed. 1972); A. Heschel, *The Prophets* (1962). Squarely in this tradition are numerous remarks attributed to Jesus. *See, e.g.*, Matthew 6:2-16; 7:1-5; 15:7; 22:18; 23:13-36; Mark 7-6, 12:15; Luke 6:42, 11:42-44, 12:1, 12:56, 13:15-17.

[23] *See, e.g.*, G. Chaucer, *The Canterbury Tales* (A.C. Cawley ed.

protagonist in the *The Learning Tree* comes to doubt and question many of the simple pieties he has been taught. In the novel, the good die young while the wicked prosper, prejudice reigns, the innocent suffer; these circumstances lead to searching questions and nagging doubts. *See* Appendix. But they are not new questions; Job asked them as well.[24] Neither do they reflect hostility toward religion.[25]

Of course, plaintiffs may personally espouse and prefer an unwavering acceptance of a number of the traditional religious doctrines doubted by characters in *The Learning Tree*. The issue, however, is not whether the work disapproves of any particular religious vision, including plaintiffs', but whether its inclusion in the public school curriculum indicates, intentionally or not, that the government joins in that disapproval.

It is true that *The Learning Tree* poses questions and ponders doubts with which plaintiffs may be uncomfortable. Yet to pose questions is not to impose answers. Since the first amendment is designed as much to protect the former as prevent the

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1958); "Voltaire," *Ency. of Philosophy, supra* n.5, at ____; R. Pomeau, "Voltaire's Religion," in *Voltaire: A Collection of Critical Essays 140* (Bottiglia ed. 1968); N. Torrey, "Voltaire and the English Deists," *id.* at 69; T. Paine, *The Age of Reason: Part I* (Castell ed. 1957); *Mark Twain: Selected Writings of an American Skeptic* (V. Doyno ed. 1983); M. Twain, *Letters from the Earth* (B. De Voto ed. 1962); S. Lewis, *Elmer Gantry* (1927); *see also Classics in Free Thought* (P. Blanshard ed. 1977) (excerpts from these and other authors).

[24] *See, e.g.*, Job 21:7-13, 24:1-25, 29-31:40.

[25] Honest, even agonizing doubt is not incompatible with Christian theism. *See, e.g.*, P. Tillich, *Dynamics of Faith* 18 (1957) ("[D]oubt is a necessary element in [faith]. It is a consequence of the risk of faith."); S.H. Miller, *The Great Realities* (1955); S. Kierkegaard, *Fear and Trembling* (W. Lowrie trans. 1941); *Concluding Unscientific Postscript* (Swenson & Lowrie trans. 1941); G. MacGregor, *Christian Doubt* (1951).

latter, I cannot conclude, on the record presented, that use of *The Learning Tree* inhibits religion.

II. FREE EXERCISE CLAUSE

Plaintiffs allege that they believe that "eternal religious consequences" result to them and their children from exposure to *The Learning Tree* or discussion of it. That allegation[26] would probably be sufficient to present a free exercise question if Cassie Grove had been compelled to read the book or be present while it was discussed in class. She was not.[27]

Plaintiffs' free exercise claims appear to go further, however, and to contest the inclusion of the book in the curriculum whether or not Cassie Grove was excused. The free exercise clause does not go nearly so far. While it protects individuals from governmental interference with their religion in the absence of compelling justification, *see Wilson* v. *Block*, 708 F.2d 735, 740 (D.C. Cir. 1983); *Callahan* v. *Woods*, 736 F.2d 1269, 1272 (9th Cir. 1984), it does not protect the individual from being religiously offended by what the government does.

Plaintiffs' submissions to this court make clear that they regard *The Learning Tree* as but a single symptom of a larger social disease: the wholesale secularization of society. As one prominent theologian has observed,

> what is meant when people speak of a "secular" . . . world [is that] it seems that . . . more or less all the important

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[26] The allegation was not contested by defendents, and must be accepted here as true. No opinion is expressed as to whether Cassie Grove could meet the requisite burdens, and survive the necessary balancing tests, to establish a free exercise right to be exempt from the state's neutral school assignment. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 214-216 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963); *Callahan* v. *Woods*, 736 F.2d 1269, 1273 (9th Cir. 1984).

[27] Cassie Grove was given a substitute assignment. She was also excused from class discussion of *The Learning Tree*, but chose to remain

> spheres of human life—learning, economy, politics, law, state, culture, education, medicine, social welfare—have been withdrawn from the influence of the churches, of theology and religion, and placed under the direct responsibility and control of man . . .

H. Kung, *On Being a Christian* 26-27 (1974). While plaintiffs are free to decry this secularization, and to resist, insofar as possible, its alleged perniciousness in their private lives, it is inevitable that in such a society, plaintiffs will find much with which they disagree.[28]

The inevitability of this conflict between plaintiffs' religious rejection of "secularism" and the secularization of society suggests why antipathy alone, however, sincere, is never enough to sustain a free exercise challenge. Plaintiffs are religiously offended by a particular novel; others previously before us have been religiously offended by Trident submarines or the nuclear arms race.[29] Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible. When the contention is applied to education, Justice Jackson's admonition is especially appropriate:

> Authorities list 256 separate and substantial religious bodies to exist in the . . . United States. . . . If we are to eliminate everything that is objectionable to any of these

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[28] "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, . . . their claims would not . . . rise to the demands of the Religion Clauses." *Wisconsin* v. *Yoder*, 406 U.S. at 215-16.

[29] *See e.g.*, *United States* v. *Albertini*, 710 F.2d 1410 (9th Cir. 1983), *cert. granted*, 53 U.S.L.W. 3417 (U.S. Dec. 4, 1984) (No. 83-1624) (religiously motivated opposition to arms race); *United States* v. *Lowe*, 654 F.2d 562 (9th Cir. 1981) (opposition to nuclear submarines).

> warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result. . . .

McCollum v. *Bd. of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring). The lesson is clear: governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required. *See Wilson*, 708 F.2d at 741.

In short, distinctions must be drawn between those governmental actions that actually interefere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion. Plaintiffs allege that they believe that "eternal religious consequences" would result from Cassie Grove's exposure to *The Learning Tree*. Such a belief might well require her being excused from such exposure. *See* note 26, *supra*.

Mere offense, however, would not require her being excused, nor does mere offense at having *The Learning Tree* in the curriculum bring the free exercise clause to the aid of plaintiffs. There has been no violation of free exercise in this case.[30]

III. Conclusion

We must remain sensitive to claims that government is either interfering with a religion or is supporting a competing religion. *See Crowley* v. *Smithsonian Institution*, 636 F.2d at

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[30] While plaintiffs contend that Cassie Grove was subjected to some ridicule from her classmates and at least one arguably negative aside from her teacher because she objected to the book, there is not showing that this ridicule was sufficiently forseeable, orchestrated or sustained for it to be attributable to defendants, or sufficiently coercive to violate plaintiffs' free exercise rights. Nor was such ridicule made a subject of the complaint.

743. Neither is the case here. On the contrary, if we were to grant the relief sought by plaintiffs and remove *The Learning Tree* from the curriculum because of plaintiffs' hostility to its ideas, our action would itself threaten first amendment values. "Our Constitution does not permit the official suppression of ideas," *Bd. of Ed.* v. *Pico*, 457 U.S. 853, 871, 102 S.Ct. 2799, 2810, 73 L.Ed.2d 435 (1982) (Brennan, J.) (plurality opin.) We are bound to respect that command as well.

APPENDIX

To illustrate their objections to *The Learning Tree*, appellants appended fifteen separate passages from the work to their opening brief. Because analysis under the establishment clause is pre-eminently fact-dependent, *see Lynch* v. *Donnelly*, _____ U.S. at _____, 104 S.Ct. at 1361-62, I have appended the most relevant portions of those passages.

PASSAGE 1

Jack Winger was a poor man, but the supper he blessed that night was of things Newt liked best—fried chicken, yams, browned clabber gravy and cornbread. Immediately the talk centered around the big storm and its casualties.

"Jim was a fine fella, one of the best around here."

"How long'd you know him, Poppa?"

"We'll on to twenty years, ain't it, Sarah?"

"Closer to twenty-three, if mem'ry serves me right—use your fork, Newt! Seems he came about two years after us."

"Funny thing," Newt said, "old Collie was right side him and didn't even git scratched. How you figger that, Poppa?"

"The Lord works in funny ways. Just wasn't the dog's time to go—pass the gravy, Prissy—was Jim's time. Simple as that."

"Anybody hear from Uncle Rob." . . . .

Sarah was about to answer when Pastor Broadnap appeared at the screen door. "O-ho," he beamed, "caught you sittin' for supper!"

The rotund minister swept into the room, his long black preacher coat flapping at his knees. Little pods of sweat stood out on his forehead at the point where the hairline receded sharply, as if it were shaved. He scanned the

table. "Just in time to share the givts of the Lord," he said.

"Oh my," Newt mumbled, "there goes my chicken legs."

* * * *

"Bless you, Jack. Bless you." He was flooding the cornbread with gravy now. "Well," he continued, chewing. "I attach a very special meanin' to that storm. It's (Newt winced as Broadnap teethed the meat from the bone) a warnin' to the wrongdoin' of all these sinners round here. This place is poppin' with sin—people drinkin', cuttin', fightin' and doin' all sorts of things the Lord don't approve of; nobody comin' to church like they ought'a. Why, I'd say Chappie Logan's place got more drunks in it than we got members on Sunday mornin'."

Sarah Winger looked at the pastor and said, "For some reason it's the good ones who go first."

"Thinkin' bout Jim Pullens, huh, sister Winger?" Broadnap said, dipping into the jar of apple butter with his knife. "Well, it's hard to explain—hard to explain. Jim was a fine man. Always come to church and prayer meeting'. Only way I figger it is that the Lord takes the good ones like that so the bad ones'll hafta take more responsibility."

"Old Sam Wong got it too. They ain't found him yet, I hear."

"Naw, and with half that block on top of him they might not find him for a couple of days," Pete said. "And to think he was out safe, then went back for his cat and got killed."

"Well, you find out lots 'bout people in a big wind like that. Some proves weak, some proves strong." Jack Winger wiped his long mustache with his wrist and pulled his pipe from his pocket. "It's a easy time to cut lamb from sheep. Think God does prob'ly send things like this to test us. Wouldn't be surprised if he didn't get tangled up hisself tryin' to figger out these here folks in Cherokee Flats."

* * * *

"Now, Newt, you been studyin' your Sunday school lessons lately?"

Newt gulped, "Yessir, I _____"

"Fine. Now if you tell me the name of the weapon Samson slew the Philistines with, the leg's yours." Broadnap grinned smugly.

Newt scratched his head in deep thought (Slingshot . . . naw, that was David . . . spear . . . naw . . .). "I got it!" he blurted out. "The jawbone of a _____ a _____" He looked sideways at his mother.

"A what?" Broadnap snapped.

A wry smile wrinkled Newt's face. "Well, I can't name it right out, but it's the same name as that part left on the platter."

"The ass," Broadnap grunted, dumping the leg on Newt's plate, "the jawbone of an ass."

Everybody laughed.

"Newt," Sarah admonished, "you shouldn't take that leg from Reverend Broadnap. Now _____"

"Oh now, sister. The boy won it fair 'n square. I'll take what's left," Broadnap countered, spearing the chicken rump from the platter.

* * * *

"You been over to see the little Johnson girl, Reverend?"

"Yes, sister Sarah. That child's lucky to be livin'. Hardly any hair or skin left on her. Doc Cravens says we got to ask for some volunteers in church Sunday."

"Volunteers for what?" Jack asked.

"Well, seems like Doc's gonna try to graft new skin on her. That means somebody's gonna have to give some'a theirs."

Sarah looked up in astonishment. "You mean Doc intends to strip skin off somebody else and put it on her?"

"That's what he's sayin', sister Sarah, if she's gonna live any kind'a normal life again."

"Poor child. It's a awful thing—a awful thing." Sarah said, shaking her head.

"Don't worry, sister Sarah, she'll be helped. Some good souls'll come forward."

"Hot coffee, brother Broadnap?"

"No, Jack. Ain't been sleepin' too well lately. Next time round, maybe. Got some more visitin' to do on my way to the parsonage. Sister Pullens and a few others." He got up. Those about the table started to rise, but he spread his arms above them. "Sit, my dear children, and bless you, sister Sarah, for the wonderful repast." He plucked several toothpicks from a bowl and picked up his black "preacher's" hat from the sideboard. As he passed Newt he patted him on the head. "Keep studyin', boy. Givin' the right answer meant that chicken's leg instead of the part that went over the fence last." He chuckled. Then he plopped the hat on his head and left as suddenly as he had come.

PASSAGE 2

* * * *

He thought, "What are grasshoppers for anyway, and snakes and mosquitoes and flies and worms, wasps, potato bugs and things? Seems they ain't much good to the world, but God put 'em here. Seems they got as much rights as we have to live. If the grasshoppers didn't eat the crops, they'd starve. No worse'n us killing hogs and chickens so we don't go hungry. Hogs and chickens and cows and rabbits and squirrels, possums and such must hate us much as we hate mosquitoes and gnats and flies. Dogs and cats and horses are 'bout the luckiest. 'Bout the only ones we don't go round killin' off all the time. The Ten Commandments say we oughtn't kill, then we come home from church and wring a chicken's neck for dinner—and Reverend Broadnap eats more'n anybody else." Newt stretched, "Too much for me to figger out," he said aloud.

PASSAGE 3

* * * *

"Momma, can I ask you somethin?"

"Yes, boy. What you want to ask me?"

Newt pondered briefly, and Sarah slowed her pace. "Well, I don't know offhand, just about people and things

like that."

Sarah smiled to herself, for she remembered that for the past year she had wanted to talk with Newt about "people and things" but thought him too young to understand the things she wanted to speak of. She had planned especially for him, her youngest, since the day he was born, but in the trials of living and caring for all the others she found it hard to clarify and formulate these plans. Now she welcomed the breakthrough. "Newt, you just ask me anything you want and I'll try to answer you."

"Well, after the storm, Poppa said that the storm and the people killed and everything was the doin' of God. You care if I ask you why he kills some people and not the others? Poppa said hisself that Mister Pullens was a good man. And why did some of the town get torn up and the rest didn't?"

Sarah Winger came to a complete stop, and Newt was instantly afraid he had offended her. He took a step beyond his mother, his face pointed straight ahead, eyes lowered and cast sideways for the reaction. Her lips parted, but she didn't speak immediately; then she started moving again.

"Newt."

"Yessem"

"You know your poppa and me are religious people, don't you?"

Yessem."

"Well, it would be real easy for me to say, you don't question the ways of God—and I was tempted to—but I know deep in my heart that there's more to it than that. It's true he guides us. But we cain't depend on him for everything. We gotta do things for ourself. Now, maybe if Jim had built himself a storm cellar or a stronger house, he wouldn't a got killed so easy. And if little Fannie Johnson's momma hadn't been drunk, she'd a held onto that lamp and her daughter wouldn't a got burnt. It's like I say, we got to do some things for ourself. If you got a battle to fight, you cain't rightfully ask the Lord to help you and not the other fella. Now can you?"

"No, ma'am."

"No, son, you got to fight and hope God likes the way you're using your fists. And that goes for the boy you're fightin'. Ain't neither one of you got time for prayin' while you're flingin fists. Too many people, especially some of ours, boy, sit round waiting' when they should be out doin'. You got to always remember that, boy, always."

"Yessem. Are we gonna live here all our life.?"

Sarah looked searchingly at him. "Don't you like it here?"

"I don't know, Momma. I ain't never been no place else."

"I hope you won't have to stay here all your life, Newt. It ain't a all-good place and it ain't a all-bad place. But you can learn just as much here about people and things as you can learn any place else. Cherokee Flats is sorta like a fruit tree. Some of the people are good and some of them are bad—just like the fruit on a tree. You know that, don't you, boy?"

"Yessem."

"Well, if you learn to profit from the good and bad these people do to each other, you'll learn a lot bout life. And you'll be a better man for that learnin' someday. Understand?"

"Yessem."

"No matter if you go or stay, think of Cherokee Flats like that till the day you die—let it be your learnin' tree."

"Do we all have to die someday?"

"That's one thing we all have to do, boy. No matter who you are. That's why it's so important to be ready when your time comes."

"You mean to be a Christian, like you and Poppa?"

"In a way—in a way. But it's even more than sayin' you're a Christian. It's a matter of givin' more to this world than you take away from it. So when you die you don't owe it anything. It's bein' able to love when you want'a bate—to forgive them that work against you—to tell the truth even when it hurts—to share your bread, no matter how hungry you are yourself. Dyin' comes easy when you know you've done all these things right."

"I'm gonna hate dyin'."

"Won't none of us like it, boy—none of us."

"I hate dyin' so much I wish sometimes that I wasn't even born."

Sarah blurted, "Why, I'm surprised at you sayin' such a thing." When she saw his face she knew he realized that she was stalling for time.

"Is there anybody who has ever come back from death that saw heaven?"

Sarah signed (Who's this boy been talkin' to? Where's e getting' such notions?) "No, boy. Ain't so such thing as that ever happened, to my knowin'."

"Well then, how does anybody know there is such a place?"

Her mind's eye flashed frantically from Matthew to Revelations, criss-crossed ages of praying, of shouting and of preaching. And finally her lips betrayed her searching, ages of it—made light of the blindness, broke with believers; with the mountains of ever-so-solid faith. "Newt." (And already her expression made him sorry he'd sprung the trap.) "Honestly, I don't know. Maybe there ain't no hell either. Maybe there ain't no gold thrones in the clouds and maybe their ain't no pits of fire tended by a devil with a pitchfork tail. I honestly think God made us and expects us to do some good while we're here on earth. I cain't even say that God's his real name, but it's good as any. It means Almighty."

Confusion disturbed her thoughts. "All my life I've been told there is a better place beyond this one, Newt. And I guess I'll go to my grave believin' it. Such believin' has kept our family goin' when there wasn't much else to go on." She paused for a moment. Swallows, flying low and fast, fluttered the stillness. Then she spoke. "These are the things I was taught. It's awful hard now, this late, not to believe them." They didn't talk after that.

PASSAGE 4

* * * *

Wham! The blast came as he fumbled with the other strap (sounded like a double-barreled shotgun . . .). He got to his feet, leaped over the bed, then, ever so cautiously, peeped out the window. It was Clint, on top the overturned chicken house, reloading the gun and hollering, "I'll get the son-of-a-bitch yet! I'll get him!"

Newt started for his mother's room, but she was already rushing to the kitchen door. Newt followed her. Pete's voice ricocheted against Prissy's. "Who's shootin'? What the matter? Momma! Momma! What's goin' on! Come back here, Newt! Somebody's shootin' out there!"

"It's Clint. He's still drunk!" Newt hollered, slyly enjoying the early excitement. And as he ran out behind his mother, he saw Clint blast away at the sky. Wham! "I'll get the son-of-a-bitch!" Wham!

Sarah Winger didn't stop until she was at the foot of the chicken house. "What you call yourself doin', boy? Who're you shootin' at?" Her tone was in keeping with the Sabbath.

Clint rocked around unsteadily, reloading the gun. "I'm gonna git him! Don't worry. I'm gonna git him."

"Git who? Who you shootin' at, boy?" she shouted.

Clint wobbled precariously, pushing in the shells. "I'm gonna blow the ass off Jesus Christ, the long-legged white son-of-a-bitch! I burned him a little that last shot. I'll get him for shore this time!"

PASSAGE 5

* * * *

"He's a thinkin' boy, Jack. You should'a heard some of the questions he asked me about religion and death. I was hard put for the right answers, I'll tell you."

"Religion and death?"

"That's right, religion and death."

"I declare, he's gittin' crazy notions from someplace."

"His questions wasn't just crazy notions. They made me do a lot of thinkin' afterward. They were about things I

used to wonder about when I was a girl, but didn't talk about just because I was scared to, for some reason or another."

"Well, one thing 'bout death, when your time comes, you're goin', and that's that. Ain't very hard to answer that." "It ain't just dyin' he wonders about. It's what comes after."

"He needs to go to church more, maybe."

"We been goin' to church all our lives, and so has he; still hearin' the same things we been hearin' since we was his age. The answers that used to satisfy us ain't goin' to satisfy Newt and the young ones comin' up now. They want proof. Some kind they can see and feel. And they're goin' to want more out of this world than we're gettin' out of it. Time's changing', Jack."

"This is a white man's world, Sarah. Ain't no time goin' to change that."

"No, maybe time won't, but this new crop of colored boys and girls will. You and me prob'ly won't live to see it, but these kids comin' along today are goin' to find a way to change things."

"The white man's got the money and guns—that spells power."

"There's more'n one way to skin a cat, Jack. Schoolin's more powerful tharn guns or money in the end. I honestly hope someday Newt'll git out of here and go where chances will be better for him. I pray for that."

PASSAGE 6

* * * *

"Now, my good children, look at me. Cast your eyes upon the servant of the Lord! Look at me." (Newt feels his mother's eyes upon him—and his shoulders lean back to the time-polished bench, his eyes are stubbornly toward the pulpit.)

Suddenly Broadnap hunches his shoulders, extends his long arms from his coat sleeves, points his index fingers at the congregation. His head, hawklike and fierce, juts for-

ward. His eyes, burning under sweat-drenched brow, search the upturned, hypnotized faces. "Look at me and tell me, my dear children, *what's your life?* . . . think about it in the bright of day and the black of night! . . . *what's your life?* (his fingers recoil into his fists—his arms drop; the tempo breaks and calm begins to return; the choir is singing. "What a friend we have in Jesus") . . . Thank you, dear God who giveth us life through our Lord, Jesus Christ . . . bless you, my children, and lest we forget His kindness to us during this awful tragedy—let us pray." (The congregation, spent and still moaning, bows in silent prayer. Newt slumps forward again and brings his mind to the fried chicken that always comes with the Sabbath.

Reverend Broadnap raises his arms again, this time for sinners and confessioners. Several are going forward—Fred Jenkins, Clara Brown and Otis Moses. Now everybody's curiosity is up, because Lester Saunders (he's wearing them white spats) is raising his head for confession. "What can God do to make me understand myself?" he asks.

Broadnap, mopping his brow, looks down at him. "What's troublin' you, son?"

"I don't like women." The church is very still.

"You don't like women?"

"No, I don't like women."

"How long have you been like that, brother Saunders?"

"Ever since I was a man."

Broadnap's thumbing his Bible. "Don't worry or be ashamed, brother Saunders. God acts in many ways. It may be your conviction." Now he stops and reads from the Bible—from Romans, 14th Chapter," "'One man hath faith to eat all things; but he that is weak eateth herbs; and let not him that eateth not, judge him that eateth; for God hath received him. Who art thou that judgest the servant of another? To his own Lord be standeth or falleth.'"

Lester is looking the minister straight in the eye. He turns and looks at the congregation. His left eye is damp. Now he is walking very fast, switching-like, down the aisle. Sadness is on his face. He's pushing through the

swinging doors at the rear of the church. They swish back and forth—and he is gone. It is still very quiet. Reverend Broadnap raises his arms above the others and begins to bless them into the church—and again the choir is singing, "What a friend we have in Jesus."

PASSAGE 7

* * * *

"Help him up, boy. Git him to the house. He's so drunk he can hardly stand up, let alone shoot anybody." Newt bent down and helped Clint to his feet, and the three of them went back to the house.

As they entered, Newt saw Rende peeping at the bedroom door. When she heard her husband groan and collapse to the floor, she crept back into the parlor with Busty and Gin-gin in time to see her mother hide the gun behind the china cabinet.

Jack threw some more coal in the fire and spat in the scuttle. "Just look at him," he said in a half growl, "his maw and paw shore wasted a night when they made him."

* * * *

Rende wept, "What am I goin' to do, Momma? What am I goin' to do?"

Sarah put her arms about Rende's shoulders. "We've just got to pray over him, that's all. We've got to keep prayin'"

Jack blow out a ring of smoke, "I declare, prayin' ain't gonna do that varmint no good, none a'tall."

"Jack, I want you to stop talking like that. You know ——"

"I'm tellin' you, Sarah—Clint's lost. God and the devil's both quit strugglin' for him, so it ain't much nobody else can do—I don't care how long and how loud they pray." He knocked his pipe on the coal scuttle and some loose ashes fell out. "He's lucky it's you who handles him. If it's ever me who has to take that gun away from him, he ain't gonna find it so easy. Fact is, he's gonna end up with a cracked skull."

PASSAGE 8

* * * *

Christmas at Spit's School for Boys wasn't much different from any other day. . . .

Marcus ate alone in the dimness off his cell.

* * * *

He had just settled back on the cot when Crapper hollered, "You got some visitors, Savage! Git up and try lookin' happy."

"Screw you." Marcus growled sullenly.

"Fool with me and you don't see nobody," Crapper warned.

"I don't give a goddam. Ain't nobody I want to see nohow."

But by now the visitors were coming down the corridor.

"Right this way. Rev'rend," Crapper said. He spoke with an exaggerated politeness that forced a grunt of disgust from Marcus. The cell door swung open and through it came Reverend Broadnap, Maggie Pullens—carrying a bag of fruit and candy—and Deacon Henry Fuller. Reverend Broadnap stepped over and touched Marcus on the shoulder. Marcus stiffened. He wanted to tell them all to go, but he held his tongue.

"We come to pray for you and to wish you a merry Christmas, son." He didn't answer, and Broadnap turned to the others and said, "Let's pray."

They knelt on the floor. Marcus' fingernails dug into the palms of his hands and his teeth ground together in an angry embarassment. He kept his eyes low and straight ahead, as if ignoring their presence.

"Oh Almighty God," Broadnap began, "we come to you on bended knee praying' for the sould of this young sinner." Marcus' muscles flexed and his gaze shot defiantly to the tops of their heads, then to Crapper, who stood in the doorway with an evil grin on his face. "Wash his black sins away in these white snows of your holy Christmas. Lighten the troubles he has brought to his young dark

days. Bring peace to his tormented soul and help him to someday leave this place a cleaner and better young man. Oh God, show him the light. Show _____"

"Shut up! Shut up!" Marcus shouted, "and git the hell out'a here!" He was on his feet now. "I don't want'a hear none of your Uncle Tom prayin' over me!" The three people rose, shocked beyond belief.

"You don't know what you're sayin, boy!" Broadnap half whispered, trying to quiet him down, reaching again toward his shoulder.

"I know much 'bout what I'm sayin' as you do," he shot back, pulling away.

Maggie put the bag of fruit on his bed. Broadnap took out a Sunday school card with the picture of Christ on it and placed it on the table. "Read the scripture here on the back, son," he said, "and pray to the Savior. He'll hear you."

Marcus snatched the card, tore it in half and threw it at the preacher. "You and your white God git the hell out'a here!" he shouted. "I don't want no part of you soul savers—bendin' down, like Paw says you do, kissin' the feet of a poor white trash God." Tears were in his eyes now. "Look at Crapper there! He's white! Whyn't you git down and start moanin' and groanin' to him, so he can kick the crap out'a you like he does all us 'nigga' boys. Yeh, that's what he calls us—nigga! nigga! nigga! Tell 'em, Crapper. Tell 'em what you gonna do to me when they leave! Tell 'em."

"Son _____"

"Don't son me. Just git goin'! So Crapper can tease me 'bout you niggas comin' here to pray over me!"

Broadnap, Maggie and Henry Fuller filed out, their heads shaking. Crapper slammed the door shut and followed them down the corridor. Marcus sat very still for awhile, then suddenly he began to feel a deep sense of guilt, deeper than any he had ever felt in his whole life. He was bewildered. These people had come all that way to help him and he had hurt them, said things he didn't realize he could say. But what he'd said was more for Crapper than for them, he realized. If Crapper hadn't stood in the door with that silly grin on his face, things

might have been different. But it was too late now. The harm was done. Yet, somehow, he felt he had got a point across to Crapper. He didn't know just what. Maybe he was really defending those people against somebody like Crapper, who had once told him, "All niggas are stupid and crazy." In a way he was telling him that they weren't, that he was on to his kind and their "lily-white God" that his paw damned when he got drunk.

He glanced up. Crapper was back. Marcus said nothing.

"Merry Christmas—nigga," Crapper said disdainfully, and turned back down the corridor.

Marcus was silent. His head fell back in the shadows and he closed his eyes, trying to form the image of a God with black skin, thick lips and coarse hair like his—but he couldn't. The image on the torn card at the foot of his bed had been implanted much too long before. It was difficult to erase that image now, or even substitute another one for it.

PASSAGE 9

"It was awful the way that Savage boy talked to us—simply awful," Maggie Pullens told Sarah as the two of them sat in the Winger front room that night.

Sarah thought for a while before answering, then she spoke what she knew to be the truth. "It ain't really the boy's fault, Maggie."

"Then whose is it, for the good Lord's sake?"

"That could've been Newt, Beansy, Earl or any of the other young ones around here. If we want to tell the truth about it, then we would say it's our fault—all the Christians, black and white, and teachers and officeholders and everybody who's supposed to have good in them."

"Yes—yes, yo're right, Sarah. Guess you're right."

"Our young children's minds here are mixed up. This place with all its drinkin' and fightin' and murderin'—Jim Crow schools, picture shows and eatin' places is too much for these young ones to figure out. They've got bigger ideas about livin' than you and me had at their age, Maggie."

"We're in a rut for shore."

"We was born in a rut, and the reason we've been able to keep goin' is because we always thought someday we're goin' to get out of it. I ain't one to fool myself about my chances any more, but I'm goin' to do all I can to see that my children don't get bogged down here forever."

"It's a big problem, all right."

"Take that Savage boy—nobody's ever done anything big to help him. He should've been taken away from Booker when he was a little boy and put in a good home. There just ain't much good can come of him now."

"The only people tryin' to do anything a'tall is our church missionary society."

"That's true, Maggie, but it's might hard trying to push out misery and fill empty stomachs with the word of God. Booker Savage asked me one day if we had a Jim Crow heaven waitin' for our saints."

"That man's awful—just awful."

"Told me Chappie Logan was his god, 'Least he's black like me,' he said."

"Awful—just awful," Maggie moaned. A moment later she got up to leave. "Well, I have to be moseyin' on. Tired after that long trip up there."

PASSAGE 10

The crowd had grown ugly and boisterous. They were already making their bets. If he quit now no one would understand, and everyone would think he was a coward. If he didn't fight, he might take a worse beating from the crowd than he would from Marcus. He wanted to ask God to help him fight to win, but he suddenly remembered his mother's telling him on the river road, many nights back, that God couldn't favor one fighter against another. He thought next of Pete, wished he were there. The lesson began to come through (cock the right—jap with the left—feint him out of position—jab—throw the right—).

PASSAGE 11

* * * *

He wondered, as he had often done before, what the whites' real reasons were for denying them a part in the school's athletic and social affairs. "Why does our color make such a difference? . . . Didn't God know that we'd have a lot off trouble if he made us black? . . . Since he's white, maybe he don't care either." He smiled wryly. "Never seen black angels . . . even the chariot horses are white."

PASSAGE 12

"How'd you git over here so carry?" Beaney asked.

"Got a new babe with a big new car," Skunk lied. "You ought to see her. She's got hair down to her ankles and a keester that would make old Rev'rend Broadnap throw his Bible in a privy hole."

PASSAGE 13

* * * *

Newt found himself repeating after the bailiff. "—to tell the truth and nothing but the truth, so help me God." He asked strength of something, be it God or whatever, to carry him, his family and the rest of the colored people safely through the trouble he now imagined his testimony would bring.

PASSAGE 14

Newt sat on a barrel in the corner of the kitchen, listening to the downpour vibrate the tin roof above him and watching Lou and Clara ready for the evening meal. Realizing that if his mother died he might have to live with one or the other sister, he observed them closely—trying to decide which one he would rather be with. He liked them both, so he sat mentally sifting their habits and dispositions, applying them to his own simple, yet important, personal plans and desires. "Clara's a little bossy," he thought. "She'd prob'ly want me to stay in all the time—want to pick all my friends, too, but she likes to dress fancy—prob'ly help me get some keen things to wear. Lou's easygoin' and easy to fool. I like the way she fries potatoes, but she'd prob'ly want me to go to church all the time. Sure had enough religion to last me a long time."

PASSAGE 15

Dawn arrived painfully slow, and Newt, as if in a trance, lay gazing out the window through the dank lace curtain. he watched the sky pale as the sun climbed to the foggy horizon and brightened the upper reaches. His mind, with unaccountable calm, explored the reality of this hour over the deep, uneven snoring of Roy and Pete, sleeping beside him.

Their mother was dead, he knew, but it was hard to believe. Suddenly he wondered if, somewhere up there in the pale blue nothingness, her soul—free of tortured body and earthly things—was already floating silently about, knowing at last the real purpose of its sojourn on a complex and troubled earth. What if she found that all the praying and religious rites were just a lot of folly; that her soul floated with no more righteousness or dignity than that of Doc Cheney, Big Mabel, or even Captain Tuck? What a shock it would be to her!

He now thought uneasily of such a possibility, and he couldn't help but feel that this was more than likely the case—and the feeling shamed him. Then he softened his shame with the reasoning that if such were true, she would never begrudge anyone such equality. Whatever judgment settled upon her, he thought, would surely be the best that eternity could possibly extend.

As Newt dressed quietly, the sun burned through the fog, warming the wet rooftops, drying the leaves and grass. And the moist cool earth took in the heat and in return gave forth little curlings of cloud that quickly disappeared in the clean morning air.

He entered the dining room and looked around. Everything was just about the same except the door which the shot had blasted. Stepping to it, he ran his fingers over the splintered surface. Daylight leaked through it now, and a sudden fright gripped him, for he realized that this destruction was actually meant for Rende. Remembering the gun against his father's head, he shivered and stepped back involuntarily (this could've been Poppa's skull), then he moved warily across to his mother's room. They had already taken her to the undertaker's.

The odor of camphor and medicine still hung in the air,

and a bouquet of withered posies lay on the rocking chair in the corner of the room. The sheets had been removed, and the mattress was doubled upon the sagging springs. Above the antique dresser hung an oval-shaped photograph of his father and mother, framed in a polished, worn wood. It had been taken their wedding day, and both stared straight ahead—unmindful of this faraway moment when their last child would stand silent, alone and uncertain in this room of death.

Almost in every sense, Newt had come to link death with violence. Even his mother's passing, he thought, couldn't escape a brush with it. Nearly everyone he had known intimately, and who had ceased to live, met their demise in bloodshed. And it was probably the reason that he feared death so much—and this fear, he reasoned, was childish. His mother's easy, tranquil and unflinching acceptance of death enhanced his respect for her. Now, this morning, it was creating within him a near-fanatical desire to rid himself of this stigma that had dogged his soul since the day of Doc Cheney's death.

Turning from the room, he channeled his thoughts into an imaginary rectangular hole that someday would be his grave. And his whole being reacted against the eternal blackness, the unending airlessness, the unchangeable recumbent position of his body—never to eat, taste, feel, speak or hear again. He shuddered. Now he envisaged the others reporting about him, acre after acre; worm-bored coffin sides, everlasting decay, dust piling forever upon eternal dust—entombed in the still, suffocating blackness.

Why, then, was life given, and for no logically explained reason taken away again? He recalled the rolling, wearisome voice of Pastor Broadnap. "____ From dust you came and to dust you must returneth!" Newt remembered his authoritatively hollering such things over Big Mabel's coffin. He remembered, too, his swing about the pulpit, frock coat flying, sweat dripping, screaming of immortality—"of the spirit, of the soul"—not the good, solid body.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CV 80-511 RJM

CAROLYN GROVE, WARREN RIDDLE, and
SYLVIA RIDDLE,

Plaintiffs

vs.

MEAD SCHOOL DISTRICT No. 354,
MARJEN AGATHER, ROY CHRISTENSEN,
RAY C. MILLER, PHYRNE OSTLIND,
and DENNIS PATTERSON,

Defendants,

and

MEAD EDUCATION ASSOCIATION,

Defendant-Intervenor.

Filed in the
U.S. District Court
Eastern District of Washington
FEB 28 1983

ORDER

Defendant Intervenor's motion for Judgment on the Pleadings was heard on September 13, 1982, and at the hearing, I granted Summary Judgment for defendants. An Order setting forth the reasons for my decision was issued on September 28, 1982. Plaintiffs timely moved to alter the judgment on two grounds: 1) that the judgment was erroneous as a matter of law, and 2) that plaintiffs were prejudiced when the Court construed the Defendant-Intervenor's motion for Judgment on the Pleadings as a Summary Judgment motion without prior notice to the plaintiffs.

The plaintiffs' motion that the judgment should be altered because it is erroneous as a matter of law is a motion for reconsideration. Plaintiffs rely on the arguments contained in their response to the motion, and advance no new legal theories. I am not persuaded that my decision is legally in error and the motion to reconsider will be denied.

At the time of the hearing on the motion, plaintiffs had submitted their testimony by affidavit pursuant to an order of the Court. Trial testimony was to be limited to cross- and redirect examination. Pursuant to the stipulation of counsel, I had read the book, *The Learning Tree*. Because I relied on this evidence in ruling on the motion, I converted the motion to a summary judgment motion. In their motion to alter, plaintiffs contend that they were denied the opportunity to present crucial testimony of adverse witnesses. In order to evaluate their motion, I requested plaintiffs to submit an outline of the testimony. After reviewing this testimony, I do not find any basis for altering the judgment. The testimony does not raise any genuine issues of fact and therefore the plaintiffs were not prejudiced by the conversion of the motion.

In support of their establishment clause claim, plaintiffs submitted the testimony of Eugene Regan, Superintendent of Mead School District, regarding his interpretation of the law governing use of religious and anti-religious books. My conclusion as to plaintiffs' establishment claim was based on a finding that the book does not attack religion nor teach anti-religious beliefs. The statements of a superintendant as to his understanding of the law has no relevancy to that conclusion. The testimony does not raise any issues of fact.

As to plaintiffs free exercise claim, I concluded that the non-compulsory reading program involved no coercion, a necessary element. Plaintiffs submit the testimony of Ronald Chadwick, an English teacher, regarding another student whose parents protested her reading the book, *The Learning Tree*. Although that student was assigned an alternative book, she later chose to read *The Learning Tree*. Plaintiffs contend that this is evi-

dence of coercion. Plaintiffs must show a coercive effect of the challenged governmental act upon the practice of plaintiffs' religion. That another student chose to read the book after an initial protest because she concluded it was a good book is not evidence of coercion. Summary Judgment was proper on this claim. Accordingly, plaintiffs' motion to alter the judgment will be denied.

IT IS SO ORDERED.

DONE BY THE COURT this 28th day of Feb., 1983.

/s/Robert J. McNichols
United States District Judge

UNITED STATES DISTRICT COURT
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CAROLYN GROVE, WARREN RIDDLE, and SYLVIA RIDDLE,

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MEMORANDUM DECISION

This suit challenges the decision of the Board of Directors of the Mead School Distriet to retain the book, *The Learning Tree*, by Gordon Parks, in the English curriculum at Mead High School. In 1980, Plaintiff Carolyn Grove learned that her daughter Cassie Grove, a sophomore at Mead High School, had been assigned the book in her Sophomore English class. Both Cassie and Mrs. Grove informed the teacher, Mr. Chadwick, of their objections to Cassie reading the book. Cassie was assigned an alternative book to read. She remained in the class and participated in classroom discussions. Mrs. Grove filed a formal complaint with the District pursuant to the established

policy. The District impaneled an evaluation committee which reviewed the book and concluded in its report that *The Learning Tree* "is an appropriate element of the sophomore English curriculum." Mrs. Grove and Warren and Sylvia Riddle appealed that decision to the Board of Directors of the Mead School District. After a hearing, the Board of Directors denied the plaintiffs' request to remove the book from the curriculum.

Plaintiffs then initiated this action claiming that the use of the book in the curriculum violates their free exercise of religion and establishes the religion of humanism all in violation of the First Amendment to the United States Constitution. The Mead Education Association was allowed to intervene and the American Civil Liberties Union participated as amicus curiae.

Defendant Mead Education Association moved for judgment on the pleadings and defendant Mead School District moved to dismiss. Oral argument was heard on September 13, 1982. Following argument, I orally granted summary judgment for defendants. It is appropriate that I render a written decision. A previous order of the Court had required the parties to submit the direct testimony of their witnesses by affidavit. This was done. In passing upon this motion, I read those affidavits, the book, *The Learning Tree*, and the memoranda submitted by all parties and by amicus. Since I considered evidence beyond the pleadings, the motion is treated as a Motion for Summary Judgment. Fed.R.Civ.P.12(c). Summary judgment is properly granted if there is no genuine issue as to any material fact and the Court finds that the moving party is entitled to judgment as a matter of Law. Fed.R.Civ.P. 56(c). By its motion, defendant Mead School District challenges the plaintiffs' standing. I need not reach that issue in view of this disposition on the merits.

Local school officials have broad discretion in managing school matters such as curriculum, however, they must exercise their discretion in accord with the First Amendment. *Board of Education* v. *Pico*, 50 U.S.L.W. 4831 (June 25, 1982)

The Federal Court should defer to decisions of local school boards in matters of education unless the board exceeds the constitutional limitations on its discretion.

> Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Board of Education v. *Pico, supra*, quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). First Amendment rights are clearly basic constitutional values. Therefore, I must determine if any rights of the plaintiffs which are protected by the free exercise and established clauses, are directly and sharply implicated by the School Board's decision to retain *The Learning Tree* in the curriculum.

Establishment Of Religion Claim

Plaintiffs allege that *The Learning Tree* is anti-Christian and that by using the book the school district departs from the neutrality toward religion required by the Establishment Clause. *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). The Establishment Clause was intended to protect against government sponsorship, financial support, and active involvement in religious activity. *Walz* v. *Tax Commissioner*, 397 U.S. 664, 668 (1970). The Supreme Court established a three-part test to determine whether government action is permissible under the Establishment Clause. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). To be within the Constitutional limitations upon its discretion, the School Board's decision to retain the book must (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not result in excessive governmental entanglement with religion. If any of these three principles is violated by the Board's decision, the Establishment Clause prohibits the action.

Plaintiffs do not rely on the first prong of the test to support their claim; there is no allegation that the decision of the Board

was improperly motivated. Rather, plaintiffs contend that the book "is an anti-Christian diatribe" and that retention of the book violates the second and third prongs of the test. They contend (1) that the primary effect of using the book in a literature class is inhibition of their religion and advance of irreligion; and (2) that because of the religious character of the book its use results in excessive governmental entanglement with religion. The basis for this claim is simply that use of the book is the type of activity considered to be religious under the First Amendment. Whether an activity fits within such a category is a question for the court. *Malnak* v. *Yogi*, 592 F.2d 197 (3rd Cir. 1979).

To determine whether an activity is religious in character, I must rely on prior interpretations as to practices which have been prohibited by the courts. The Supreme Court has held that reading versus from the Bible without comment and posting the Lord's Prayer constitute religious activity. *Abington School District* v. *Schempp, supra; Stone* v. *Graham*, 449 U.S. 39 (1980). In *Stone*, the court characterized the Ten Commandments as "undeniably a sacred text in the Jewish and Christian faiths". The Court found that posting the Commandments served no educational functions. The Court concluded that the only effect would be to "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." 449 U.S. at 42. In contrast, *The Learning Tree* is a novel with autobiographic overtones used in the English literature class of the school for the purposes of exposing students to expectations and orientations of Black Americans. It is also categorized as "adolescent hero" literature. The book clearly serves a secular educational function. Notwithstanding the strained interpretation placed upon the book by the plaintiffs as set forth in their affidavits, the book clearly does not attack religion, nor does it teach anti-religious beliefs. One need only read the book and the interpretation placed on certain passages by the plaintiffs, as stated in their affidavits, and the conclusion is inescapable that the plaintiffs' claim of the establishment of religion, if not totally frivolous, is untenable.

Free Exercise Claim

Plaintiffs argue that the book infringes their right to free exercise of religion notwithstanding the fact that students who object to this particular book are not required to read it and are assigned alternative reading. Plaintiffs contend that even this procedure violates their right to free exercise of religion contending that it constitutes coercion. *See Abington Township* v. *Schempp, supra* at 223. I agree that the State may not require individuals "to choose between neglecting their religious obligations and rendering themselves liable for criminal sanctions or ineligible for state benefits." *Brandon* v. *Guilderland Central School District*, 635 F.2d 971 (2nd Cir. 1980). I have difficulty understanding, let alone accepting, the argument by the plaintiffs that the non-compulsory reading policy followed by the teacher in this case constitutes some sort of coercion.

I will touch more fully now on the contention of the plaintiffs that there are material issues of fact in this case which foreclose the granting of summary judgment.

As I see it the pertinent facts are (1) the content of the book itself; (2) the fact that it is utilized in the literature curriculum; (3) the fact that any student objecting to the book as assigned reading may select an alternate book; and (4) the identity and posture of the parties. None of these facts are in dispute. Plaintiffs argue that the conclusions set forth in the various affidavits filed by the plaintiffs created genuine issues of fact. I disagree. Any person may place the interpretation he or she sees fit on any passage in a book or other publication. Such interpretation does not create an issue of fact as to whether the book constitutes either the establishment of a religion or the infringement of the free exercise of religion.

I have carefully reviewed the majority opinion, the dissenting opinion and the separate opinions of the Justices in *Board of Education* v. *Pico, supra*. I am aware that the basis issue in *Pico* was somewhat different than the issue in the instant case. *Pico* dealt with the school board's determination that certain books should be *removed* from the *library*. It did not specifi-

cally deal with books either removed from or included in the actual curriculum. However, Justice Brennan in speaking for the plurality of the court stated:

> Petitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values.

Chief Justice Burger in his dissenting opinion which was joined in by Justices Powell, Rehnquist and O'Connor stated:

> I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.

Without going into further detail I am satisfied that if the issues in this particular case was addressed by the United States Supreme Court a substantial majority, if not all the justices, would affirm the action of the authorities of the Mead School District.

I am also convinced that if the relief here requested by the plaintiffs was granted by the Court, the courts would be inundated with claims by those in our society who seek to "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *See West Virginia* v. *Barnett*, 319 U.S. 624. As Justice Brennan said in *Pico* "such purposes stand inescapably condemned by our precedents."

Conclusion

1. The use of the book *The Learning Tree* in the curriculum of the Mead High School does not constitute the establishment of any religion.

2. The use of the book does not infringe the rights of the plaintiffs or of anyone else in their free exercise of religion.

3. It is not the function of the federal courts to interfere with the curriculum established by local school officials unless constitutional values are directly and sharply implicated. Such is not the case here.

IT IS HEREBY ORDERED that this action is dismissed with prejudice. The Clerk shall enter judgment accordingly.

DONE BY THE COURT this 28th day of Feb., 1983.

/s/Robert J. McNichols
United States District Judge